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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 38

COLGATE-PALMOLIVE-PEET COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 39

COLGATE-PALMOLIVE-PEET COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 10, 1943.

CERTIORARI GRANTED JUNE 14, 1943.

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[fol.1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Appendix to Appellant's Brief

PORTIONS of RECORD—Appeal No. 7791

IN UNITED STATES DISTRICT COURT for DISTRICT of DELAWARE

JUDGMENT—April 23, 1941

And now to-wit this 23rd day of April, A. D. 1941, this cause having come on to be heard upon the pleadings filed herein and the Stipulation of Facts filed with the Court on the 27th day of June, A. D. 1940, and having been argued by Counsel for the respective parties and maturely considered by the Court, it is, upon motion of Stewart Lynch, United States Attorney for the District of Delaware,

Ordered, adjudged and decreed by the court that the complaint filed in this cause be and the same is hereby dismissed with costs to the Defendant and against the Plaintiff to be taxed by the Clerk.

John P. Nields, J.

IN UNITED STATES DISTRICT COURT

OPINION—March 20, 1941

These suits are for the recovery of Internal Revenue taxes alleged to have been illegally assessed and collected, together with interest. The suits are based on Sec. 24, Par. 20 of the Judicial Code, as amended (28 USCA 41 (20)).

The subject of the tax is the processing or use of coconut oil, palm oil, palm kernel oil and sunflower seed oil, hereinafter referred to as "oils." Cocoanut Oil is made from products grown in the Philippine Islands. This tax is imposed by section 602½, c. 277, of the Revenue Act of 1934 (48 Stat. 680).

[fol.2] In suit No. 2 plaintiff seeks to recover $1,476,507.81 paid as tax on the processing or use of oils from

May 10, 1934 to April 31, 1935, with interest. In suit No. 58 plaintiff seeks to recover $885,874.56 paid as tax on the processing or use of oils from May 1, 1935 to January 31, 1937, with interest. The two suits are consolidated for trial. The material facts are stipulated.

Plaintiff is a Delaware corporation with its principal office and place of business in Jersey City, New Jersey. It manufactures and sells soaps and other products. In that manufacture it uses coconut oil and the other oils. May 10, 1934, the effective date of section 602½, plaintiff had on hand 78,746,079 pounds of oil (49,216,927 pounds of oil covered in suit No. 2 and the balance of 29,529,152 pounds covered in suit No. 58). Before that date these oils had been processed one or more times in the United States. After that date these oils were subjected to further processing or uses by plaintiff in the manufacture of articles for sale. Plaintiff reported the amounts of oils processed and paid a processing tax with respect to the first processing occurring after May 10, 1934. Such taxes were paid under protest. Claims for refund were filed and rejected by the Commissioner.

Section 602½ of the Revenue Act of 1934 imposing a "processing Tax on Certain Oils" provides in part:

"(a) There is hereby imposed upon the first domestic processing of cocoanut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sen- [fol. 3] tence) a tax of 2 cents per pound, to be paid by the processor, upon the first domestic processing of cocoanut oil or of any combination or mixture containing a substantial quantity of cocoanut oil with respect to which oil there has been no previous first domestic processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such cocoanut oil (whether or not contained in such a combination or mixture), * * *. All taxes collected under this section with respect to cocoanut oil wholly of Philippine production or produced from materials

wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at anytime the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, cocoanut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

This case turns upon whether "first domestic processing" in section 602½ means the first domestic processing occurring after the enactment of the statute.

Section 602½ of the Revenue Act of 1934 became effective May 10, 1934. It imposes a processing tax upon the first domestic processing of said oils, or of any combination or mixture containing a substantial quantity of any one or more of such oils where there has been no previous first [fol. 4] domestic processing with respect to any one of such oils. The section defines the term "first domestic processing" to mean "the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, * * *."

By section 602 (f) of the Revenue Act, all provisions of law respecting taxes imposed by section 600 of the Revenue Act of 1926 are made applicable to the taxes imposed by section 602½. Under section 1101 of the Revenue Act of 1926 the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was authorized to prescribe and publish all needful rules and regulations for the enforcement of the processing tax act. August 17, 1934 the Commissioner promulgated regulations 48 relating to the processing tax on the oils under section 602½. Article (1) of regulations 48 provides:

"(1) First domestic processing means the first use in the United States on or after the effective date of the Act. At all times in these regulations, the term processing or first domestic processing will be deemed to be synonymous with 'use' or 'first use in the United States on or after

the effective date,' respectively, and will include the meanings implied in the latter terms by subdivision (k), above."

The claims for refund contain the following statements:

"On the effective date of said Act taxpayer had on hand certain palm oil, cocoanut oil, palm kernel oil and sunflower oil which had, prior to said date, been bleached and/or refined in the United States in the manufacture or production of an article intended for sale. Such bleaching and/or refining in the United States prior to said date constituted the first domestic processing of such oils within the [fol. 5] contemplation of said Section 602½ and any subsequent processing or use of said oils was not subject to the tax imposed by said Section. The tax has been assessed and collected from the taxpayer with respect to the subsequent processing or use each month of such bleached and/or refined oils and taxpayer has heretofore filed with the Collector of Internal Revenue, Fifth District of New Jersey, a protest each month against the payment of said tax on such oils, * * *."

The claims also contained the following statement:

"Regulations 48 issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury construe the term 'first domestic processing' as used in Section 602½ to mean, with respect to said oils not previously taxed, any use in the United States on and after the effective date of the tax in the manufacture of an article for sale, notwithstanding that said Section in explicit language defines said term to mean the 'first use in the United States in the manufacture or production of an article intended for sale,' etc. Any attempt to broaden the scope of said Section by said regulations is wholly unwarranted, illegal and void."

These claims for refund were rejected by the Commissioner. The grounds alleged in the complaints follow the grounds asserted in the claims for refund.

Laws refer only to transactions occurring after their enactment, unless they expressly provide otherwise. This is a well settled rule. Applying the rule to the facts of this case, it is clear that in levying a tax on the "first domestic processing" of the oils section 602½ refers to

the first domestic processing occurring after the section became law. This deduction follows from considering the [fol. 6] vital words of the statute alone.

The meaning of section 602½ appears free from doubt. However, if an interpretation of its meaning is required, that interpretation has been furnished by the Commissioner in his regulations. This interpretation has been approved by the Congress. The parties have agreed that the oils in question were domestically processed before the effective date of the act and also domestically processed after the effective date of the act. The question recurs: Does the word "first" mean the first domestic processing in point of fact whether before or after the effective date of the act or the first domestic processing after the effective date of the act regardless of prior processings.

Every statute operates on future acts unless a contrary intent is expressly declared. The Supreme Court has so stated in an unbroken line of cases from the earliest days to the present,

"* * * a law is presumed, in the absence of clear expression to the contrary, to operate prospectively; * * *."

Hassett v. Welch, 303 U. S. 303, 314.

Thus, when section 602½ levies a tax upon a "first" processing, the first processing after its effective date is subject of the tax. The statute does not concern itself with what occurred before its effective date. Processing the oil before the effective date did not change the identity of the oil. It was still oil susceptible of processing. The rule of interpretation of taxing statutes is:

"Conceding the rule of interpretation of taxing statutes to be that in case of doubt they are to be construed more strictly against the government and in favor of the taxpayer, * * * still the language used must be given its usual [fol. 7] and ordinary meaning, keeping in mind the subject-matter to which it relates. It can not under the rule of interpretation be strained beyond the breaking point in the interest of taxpayers. * * * (nor) beyond the sense in which it was used by Congress." Merriman v. Commissioner of Internal Revenue (1 Cir.) 55 F. (2) 879.

The last part of the first sentence of section 602½ provides that the tax is imposed upon the processing "of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which

oils there has been no previous first domestic processing". Congress had two purposes in view: (1) to defeat avoidance of the tax and (2) to avoid double taxation. In the absence of this provision it would have been easy for exporters or domestic processors to mix the oil with some other product and to contend that the mixed article processed was not oil since it contained other ingredients. Moreover the same oil might be taxed twice—first when first domestically processed as oil and second when in a combined or mixed form. To correct these objections the mixtures to be taxed were confined to those containing oil where there had been no previous first domestic processing. The Second Circuit held that previous "first" meant previous "taxable" and that the use of the word "first" in the section obviously meant the first domestic processing occurring after the effective date of the act rather than the first processing in point of fact in the United States. Loose-Wiles Biscuit Co. v. Rasquin (2 Cir.) 95 F. (2) 438. Cert. denied 305 U. S. 611.

Subsection (e) of section 602½ provides that if any person prior to January 26, 1934, had made a bona fide contract for the sale of any article on or after the effective date of [fol. 8] section 602½ wholly or in chief value of an article with respect to which the tax was imposed, and if such contract did not permit the addition to the amount to be paid thereunder of the whole of such tax then, unless the contract expressly prohibited such addition, the buyer should pay so much of the tax as was not permitted to be added to the contract price. Taxes payable by the buyer in such circumstances were to be paid to the seller at the time the sale was consummated and were to be paid over by the seller to the United tSates. It is thus evident Congress intended that oils already in the country as well as oils to enter the country should not escape the tax.

The regulations of the Commissioner of Internal Revenue interpreting section 602½ are valid. The commissioner has authority to construe and issue formal regulations construing internal revenue laws passed by Congress. Brewster v. Gage, 280 U. S. 327. Mass. Mutual Life Ins. Co. v. United States, 288 U. S. 269. Faweus Machine Co. v. United States, 282 U. S. 375. Since the issuance of Regulations 48 Congress has three times enacted legislation directly relating to this tax without disapproving the treasury in-

terpretation and application of the tax to the first domestic processing occurring after the effective date of section 602½. In fact, Congress has enacted four revenue acts, since the revenue act of 1934, in three of which section 602½ was specifically amended without any indication that Congress disapproved the Commissioner's regulations relative to section 602½. On the contrary, the qualifying amendment in section 702(a) of the 1936 act indicates specific approval and adoption of the Commissioner's interpretation.

Each complaint must be dismissed.

(Signed) John P. Nields, J.

March 20, 1941.

[fol. 9] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Jan. 25, 1938. Petition of Plaintiff filed.

Jan. 25, 1938. Affidavit of Eugene Ennalls Berl as to service filed.

Mar. 26, 1938. Motion by United States Attorney filed; same day order granting leave to appear specially, &c; same day order filed.

Apr. 15, 1938. Defendant appears by John J. Morris, Jr., U. S. Attorney; same day praecipe filed.

May 17, 1938. Answer filed.

June 27, 1940. Trial before the court.

June 27, 1940. Stipulation as to facts filed.

Oct. 4, 1940. Hearing on pleadings and proof.

Mar. 20, 1941. Opinion of Court filed.

Apr. 23, 1941. Final decree that complaint be dismissed with costs against plaintiff; same day decree filed.

July 19, 1941. Plaintiff's notice of appeal with bond for costs in the sum of $250.00, with Indemnity Insurance Company of North America, as surety filed.

July 19, 1941. Copy of notice of appeal mailed to Stewart Lynch, Esq., U. S. Attorney, attorney for defendant-appellee.

Aug. 7. 1941. Stipulation as to contents of record on appeal, filed.

Aug. 27, 1941, Transcript of record certified and mailed to Clerk, U. S. Circuit Court of Appeals.

[fol. 10] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—June 27, 1940

The parties hereto through their respective Attorneys stipulate the following facts for the purpose of this suit, and for no other purpose.

1. Plaintiff is and at the times mentioned in the complaint was a corporation of the State of Delaware and a resident and citizen of said State, and has its principal office and place of business in the City of Jersey City, State of New Jersey. It is and was at the times mentioned in the complaint engaged in the business of manufacturing and selling soaps and other products in the manufacture of which it used Palm Kernel Oil, Sunflower Seed Oil, Palm Oil and Coconut Oil (which oils are hereinafter sometimes referred to as "said oils"), the last mentioned oil being of Philippine origin or made from products grown in the Philippine Islands.

2. This is a suit of a civil nature at common law, arising under the Internal Revenue Laws of the United States, and the amount in controversy exceeds the sum or value of $3,000. exclusive of interest and costs. It is a suit against the United States of America for recovery of certain oil processing taxes alleged by plaintiff to have been erroneously and illegally assessed and collected under Section 602½ of Title IV of the Revenue Act of 1934 which became effective May 10, 1934, at 11:40 A. M. Eastern Standard Time.

3. Said taxes were paid under protest in the amounts and at the times hereinafter set forth to the Collector of Internal Revenue for the Fifth District of New Jersey. Said Collector of Internal Revenue was not in office at the time this suit or proceeding was commenced.

[fol. 11] 4. This Court has jurisdiction of this suit pursuant to paragraph 20 of Section 24 of the Judicial Code as amended (28 U. S. C. A. 41 (20)).

5. As shown on the attached Schedule A which is hereby made a part hereof, between May 10, 1934, at 11:40 A. M. (E.S.T.), the effective date of Section 602½ of Title IV of the Revenue Act of 1934, and May 31, 1935, plaintiff, pursuant to the requirements of Regulations 48 issued by the

Commissioner of Internal Revenue and approved by the Secretary of the Treasury, paid, under protest, taxes aggregating $1,476,507.81 with respect to the usage, month by month, during the period May 10, 1934, to April 30, 1935, of various processed forms of Coconut Oil, Palm Oil, Palm Kernel Oil and Sunflower Oil, which said oils had, prior to said effective date of Section 602½, been subjected in the United States to one or more of the domestic processings hereinafter described in the manufacture or production of an article or articles intended for sale. Said Schedule A shows the aggregate pounds of said oils (combining the several oils, Coconut, Palm, Palm Kernel and Sunflower) according to the processed form in which said oils were on the effective date of said Section 602½, and shows the respective monthly usages thereafter of such processed forms of said oils, together with the total amount of the tax paid under protest with respect to each month's usage thereof, and the respective dates of payment opposite the respective amounts.

6. The aggregate of 17,293,779 lbs. of refined oils (refined Sunflower Oil, Refined Palm Kernel Oil and Refined Coconut Oil) shown on Schedule A under the column headed "Refined" had been obtained, prior to the effective date of [fol. 12] said Section 602½, by subjecting in the United States the crude oils to the well-known commercial process of refining which is in common use and is generally referred to as the "Caustic Soda Process," which process is described as follows: The operation consists of adding to a known quantity of crude oil (Coconut, Palm Kernel or Sunflower Oil, as the case may be) a solution of caustic soda or solutions of caustic soda and salt, the amount and concentration of which are computed from a laboratory determination of the free fatty acid content of the crude oil. The crude oil is heated to a predetermined temperature and while the heated oil is being agitated mechanically or by means of compressed air, the caustic solution is added. The agitation is continued until the operator, by examining samples, observes that the "Foots" show a clean break and settle rapidly, whereupon the agitation is stopped and the contents are allowed to settle. After settling and as a result of this process, two products are obtained, viz: a supernatant layer of clear oil which is commonly known and referred to as "Refined Coconut Oil," or "Refined Palm

Kernel Oil," or "Refined Sunflower Oil" and the lower layer consisting of what is generally known as "Foots." An experienced operator can tell, from observing the samples during the refining process, when the mixture is in condition to separate properly and yield the maximum of refined oil. However, samples were sent to the laboratory for testing as to color and free fatty acid content of the Refined Coconut Oil, Refined Palm Kernel Oil or the Refined Sunflower Oil. The refined oil produced in such refining process is a different product from the crude oil, the refined oil being much lighter in color than the crude oil and being substantially free from free fatty acid.

[fol. 13] 7. The said 17,293,779 lbs. of refined oils were subsequently processed or used by plaintiff in the United States after the effective date of said Section 602½ in the respective quantities and during the respective months indicated on said Schedule A, and the tax at the rate of 3 cents per pound was paid under protest by plaintiff on the dates indicated on said Schedule A with respect to such subsequent processing or usage by plaintiff.

8. The lower layer resulting from the above process, commonly referred to and known as "Foots", is a different product from the crude oil originally put into the process; the Foots are darker in color than either the original crude oil or the refined oil and consist of a semi-solid mass of soap, water, some refined oil in emulsified coloring and other organic matter removed from the crude oil in the refining process.

9. The 1,972,373 lbs. of Foots shown on Schedule A under the column headed "Foots" represent the product obtained in the lower layer from the subjection of said oils to the refining process described in Paragraph 6 hereof and were obtained from such refining process carried on in the United States prior to the effective date of said Section 602½ of Title IV of the Revenue Act of 1934. Such Foots were subsequently processed or used in the United States after the effective date of said Section 602½ in the respective quantities and during the respective months indicated on said Schedule A and the tax at the rate of 3 cents per pound was paid under protest by the plaintiff on the dates indicated on said Schedule A with respect to such subsequent processing or usage by the plaintiff.

10. The 11,056,088 lbs. of Refined Coconut Oil and Foots shown on Schedule A under the column headed "Refined [fol. 14] and Foots" had been produced, prior to the effective date of said Section 602½, by subjecting the crude Coconut Oil in the United States to the refining process described in Paragraph 6 hereof, but on that date the super-natant layer of clear, refined oil had not been transferred to the storage tanks but remained with the "Foots" in the tanks in which the refining process had been conducted, although there was then a clear separation between the Refined Oil and Foots.

11. Subsequent to the effective date of Section 602½, the number of pounds of Refined Coconut Oil and Foots shown under the column headed "Refined and Foots" in Schedule A hereof were further processed or used in the respective quantities and during the respective months as indicated on said Schedule A, and the plaintiff paid the tax under protest at the rate of 3 cents per pound with respect to such subsequent processing or usage, on the dates as indicated on said Schedule A.

12. The 18,312,632 lbs. of Bleached Palm Oil shown on Schedule A under the column headed "Bleached" had been obtained prior to the effective date of Section 602½, by subjecting crude Palm Oil in the United States to the well-known commercial process of bleaching, generally referred to as the "Air Bleaching Process". This process consists in the oxidation of certain coloring matters in the crude oil as the result of which a product different from the crude oil is obtained, which is lighter in color than the crude oil and is generally known and referred to as "Bleached Palm Oil". The "Air Bleaching Process" consists of heating the crude oil to a pre-determined temperature after which air is aspirated or blown through the heated oil until a sample shows the desired degree of bleaching. When the [fol. 15] operator judges the bleaching process complete a sample is tested by the laboratory to ascertain if the bleached oil conforms to the required specifications.

13. The Bleached Palm Oil in the respective quantities in pounds as shown under the column headed "Bleached" on Schedule A hereof was, subsequent to the effective date of said Section 602½ further processed or used by the plaintiff, in the respective months shown on said Schedule

and the plaintiff paid a tax, under protest, at the rate of 3 cents per pound with respect to such subsequent processing or use at the respective dates shown on said Schedule A.

14. Of the total Bleached Palm Oil which plaintiff had on hand on the effective date of said Section 602½ obtained by subjecting crude palm oil in the United States, prior to said effective date, to the Air Bleaching Process hereinabove described, said 18,312,632 lbs. thereof were so processed or used as aforesaid and 307,802 lbs. thereof were sold by plaintiff to other persons or corporations throughout the period May 10, 1934 to April 30, 1935 inclusive.

15. The 103,355 lbs. of Refined and Bleached Palm Oil shown on Schedule A under the column headed "Refined and Bleached" had been obtained, prior to the effective date of said Section 602½, by subjecting crude Palm Oil in the United States first, to the refining process described in Paragraph 6 hereof and secondly, to the Air Bleaching Process described in Paragraph 12 hereof. The Refined and Bleached Palm Oil is a different product from the crude Palm Oil from which it is made.

16. The respective quantities in pounds of said Refined and Bleached Palm Oil, shown under the column headed "Refined and Bleached" were, after the effective date of [fol. 16] said Section 602½ further processed or used by plaintiff in the respective months shown on said Schedule A, and the plaintiff paid, under protest, a tax at the rate of 3 cents per pound with respect to such subsequent processing or usage on the dates indicated in the said Schedule A.

17. The 336,798 lbs. of Refined, Dehydrated and Bleached Coconut Oil shown on Schedule A under the column headed "Refined, Dehydrated and Bleached" had been obtained, prior to the effective date of said Section 602½, by subjecting the crude Coconut Oil in the United States to the three following commercial processes:

(1) The refining process described in Paragraph 6 hereof;

(2) A dehydrating process which is carried out by heating the refined oil under vacuum in a dehydrating tank until the moisture is expelled; and

(3) A bleaching process consisting of adding a predetermined amount of a mixture of Fuller's earth and bleached

carbon to the Refined and Dehydrated Oil which has been heated to a pre-determined temperature and agitating the mixture mechanically until the desired color is obtained, after which the oil is pumped through a filter press to remove the bleaching materials.

In these processes, the operations are carefully controlled by chemical tests and definite specifications must be met before the product can be graded as Refined, Dehydrated and Bleached Coconut Oil. The Refined, Dehydrated and Bleached Coconut Oil is a different product from the crude Coconut Oil from which it is made.

[fol. 17] 18. The said 336,798 lbs. of Refined, Dehydrated and Bleached Coconut Oil were, after the effective date of said Section 602½, subjected in the United States to further processing or usage by plaintiff and plaintiff paid a tax, under protest, at the rate of 3 cents per pound with respect to such further processing or usage of said Refined, Dehydrated and Bleached Oils during the respective months on the dates shown on said Schedule A.

19. Of the total Refined, Dehydrated and Bleached Coconut Oil which plaintiff had on hand on the effective date of said Section 602½, obtained by subjecting crude Coconut Oil in the United States, prior to said effective date, to the three processes above described in Paragraph 17 hereof, said 336,798 lbs. were so processed or used as aforesaid and 61,200 lbs. thereof were sold by plaintiff to other persons or corporations throughout the period May 10, 1934 to April 30, 1935 inclusive.

20. The 139,463 lbs. of Refined, Bleached, Dehydrated and Deodorized Coconut Oil shown on Schedule A under the column headed "Refined, Bleached, Dehydrated and Deodorized" had been obtained, prior to the effective date of said Section 602½, by subjecting the crude coconut oil in the United States to the three processes described in Paragraph 17 hereof and in addition thereto, had been subjected to a fourth commercial process commonly known as the "Deodorizing Process." This process consists of heating the Refined, Dehydrated and Bleached Coconut Oil to a pre-determined temperature after which it is drawn into a closed vessel or deodorizer which has been evacuated, and the deodorization is carried out by blowing super-heated

steam through the heated oil until the desired degree of deodorization has been obtained, after which said oil is [fol. 18] drawn into a cooler where the heat is extracted by water circulated through closed coils. When cooled to the desired temperature this deodorized oil is pumped through a filter for clarification. Particular skill is required in producing this grade of oil which must conform to the trade specifications for edible oil with respect to color, odor, taste and free fatty acid content. This processed oil, known in the trade as "Refined, Bleached, Dehydrated and Deodorized Coconut Oil" cannot be graded as such until after chemical tests in the laboratory, and it is a very different product from the crude Coconut Oil originally put into the processes.

21. The said 139,463 lbs. of Refined, Bleached, Dehydrated and Deodorized Coconut Oil shown on Schedule A under the column headed "Refined, Bleached, Dehydrated and Deodorized" were, after the effective date of said Section 602½, subjected in the United States to further processing or usage by plaintiff and plaintiff paid the tax, under protest, at the rate of 3 cents per pound with respect to such further processing or usage of said oil in the respective months and on the dates shown on said Schedule A.

22. Of the total Refined, Bleached, Dehydrated and Deodorized Coconut Oil which plaintiff had on hand on the effective date of said Section 602½, obtained by subjecting crude Coconut Oil in the United States prior to said effective date, to the four processes hereinabove described, 139,463 lbs. thereof were subsequently processed or used by plaintiff as aforesaid; and 241,921 lbs. thereof were sold by plaintiff to other persons or corporations from time to time during the period May 10, 1934 to April 30, 1935 inclusive.

23. The 2,439 lbs. of Scrapol shown on Schedule A under the column headed "Scrapol" had, prior to the effective [fol. 19] date of said Section 602½, been subjected in the United States to the three processes described in Paragraph 17 hereof and was recovered from the filter press cake formed when the processed oil is pumped through a filter press, as described in said Paragraph 17. The filter press cake contains some recoverable oil and is blown with steam and air to recover this processed oil which is designated on the records of the plaintiff as "Scrapol." The said 2,439

lbs. of Scrapol was, after the effective date of said Section 602½ and during the month of May, 1934, subjected to a further processing or usage and the plaintiff paid, under protest, the tax at the rate of 3 cents per pound with respect to such further processing or usage of said Scrapol on the date shown on said Schedule A, viz., July 31, 1934.

24. The processed forms of oils hereinbefore referred to and upon the subsequent processing of which were levied the taxes herein sought to be recovered, continued to be oils in their respective processed forms as hereinabove stated, up to and at the time when they were used as aforesaid after the effective date of Section 602½, said subsequent usage being in each case a use in the manufacture or production of an article or articles intended for sale.

25. Generally, though not always, after each processing of any of said oils, the resulting products were drawn from the processing tanks by plaintiff and were pumped to storage tanks where the respective processed forms of that particular oil were stored for subsequent usage or sale. When the resulting products had not been transferred to their respective storage tanks on or prior to the effective date of said Section 602½ and were not stored separately, plaintiff's records and Schedule A hereof show the quantities of the respective products combined as one item; for example, [fol. 20] where the Refined Oil and Foots both remained in the same tank on the effective date of said Section 602½, although there was then a clear separation of the two, plaintiff deemed it expedient, from an accounting standpoint, to combine both items in one account as "Refined Oil and Foots" to which reference has heretofore been made in Paragraph 10 hereof.

26. On September 25, 1935 plaintiff duly filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey, a claim for refund of the taxes paid as aforesaid, plus interest thereon, a true copy of an excerpt therefrom setting forth the basis of said claim being hereto attached and made a part hereof as Schedule B. Said claim for refund was rejected in full by the Commissioner of Internal Revenue on January 27, 1936 and this suit was thereafter timely instituted.

27. If plaintiff is entitled to recover herein, it is entitled to recover from the defendant the sum of $1,476,507.81

plus interest at the rate of six per cent per annum until payment, on the following sums:

On $240,980.64 from July 31, 1934
On $112,712.91 from August 30, 1934
On $153,444.03 from September 29, 1934
On $159,240.75 from October 30, 1934
On $204,164.70 from November 27, 1934
On $134,235.93 from December 29, 1934
On $115,777.23 from January 24, 1935
On $73,269.06 from February 27, 1935
On $76,461.09 from March 28, 1935
On $99,040.83 from April 26, 1935
On $107,180.64 from May 25, 1935

[fol. 21] 28. In administering Section 602½ of the Revenue Act of 1934, the Commissioner of Internal Revenue has always construed said Section to mean that the liability for the tax accrues during the month when the first processing after May 10, 1934, in the United States of the specified oils occurred, in the manufacture of an article intended for sale, irrespective of whether such manufacture was completed during the month of such first processing or whether further processings in such manufacture were necessary and occurred during subsequent months.

29. It is understood and agreed that the facts hereinabove stipulated constitute the entire proof to be offered in this case, provided, however, that in stipulating said facts neither party admits the competency, relevancy or materiality of any of such facts, but each party reserves the right to object to the competency, relevancy or materiality of any stipulated fact, and if any such objection is sustained by the Court the other party shall be at liberty, for purposes of the record, to offer oral testimony or other proof in lieu of the stipulated fact or facts so stricken by the Court.

E. Ennalls Berl, Attorney for Plaintiff. Stewart Lynch, Attorney for Defendant.

Dated: June 27, 1940.

(Here follows one paster, folio 22))

[fol. 22]

SCHEDULE "A" TO STIPULATION OF FACTS

Colgate-Palmolive-Peet Company

Table Showing Month by Month Usage in Pounds Between May 10, 1934, at 11:40 A. M., E. S. T. and April 30, 1935, of Processed Forms of Vegetable Oils (Coconut, Palm, Palm-Kernel and Sunflower) Which Oils Had Been Domestically Processed Prior to the Effective Date of Section 602½ of the Revenue Act of 1934; the Tax Paid Under Protest by Plaintiff with Respect to Such Subsequent Usage, and the Respective Dates of Payment Thereof, the Quantities in Pounds of the Various Oils Are Combined and Grouped According to the Processed Form Thereof.

Period		Refined	Foots	Refined & Foots	Refined and Bleached	Bleached	Refined, Dehydrated & Bleached	Refined Bleached, Dehydrated & Deodorized	Scrapol	Total Used	Tax Paid	Date of Payment
1934	May	2,007,171	209,613	310,903	44,115	1,145,753	319,678	127,824	2,439	4,167,496	$125,024.88	7-31-34
	June	1,689,490	493,920	649,691	780	1,003,001	17,120	11,190		3,865,192	115,955.76	7-31-34
	July	2,104,143	31,196	435,962	58,460	1,126,887		449		3,757,097	112,712.91	8-30-34
	Aug.	2,093,976	39,988	1,135,932		1,844,905				5,114,801	153,444.03	9-29-34
	Sept.	2,132,751	none	1,506,837		1,668,437				5,308,025	159,240.75	10-30-34
	Oct.	3,393,161	98,638	1,089,790		2,223,901				6,805,490	204,164.70	11-27-34
	Nov.	2,232,455	128,651	693,294		1,420,131				4,474,531	134,235.93	12-29-34
	Dec.	1,082,905	351,590	799,128		1,625,618				3,859,241	115,777.23	1-24-35
1935	Jan.	407,214	291,043	783,051		960,994				2,442,302	73,269.06	2-27-35
	Feb.	150,513	189,153	1,029,785		1,179,252				2,548,703	76,461.09	3-28-35
	Mar.	none	138,581	1,614,637		1,548,143				3,301,361	99,040.83	4-26-35
	Apr.	none	none	1,007,078		2,565,610				3,572,688	107,180.64	5-25-35
		17,293,779	1,972,373	11,056,088	103,355	18,312,632	336,798	139,463	2,439	49,216,927	$1,476,507.81	

[fol. 23] SCHEDULE B. TO STIPULATION OF FACTS

II—Refund of the Tax Assessed and Collected Upon the Subsequent Use of Oils First Domestically Processed Prior to the Effective Date of the Act, viz., May 10, 1934, at 11:40 A. M.

Regulations 48 issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury construe the term "first domestic processing" as used in Section 602½ to mean, with respect to said oils not previously taxed, *any use in the United States on and after the effective date of the tax* in the manufacture of an article for sale, notwithstanding that said Section in explicit language defines said term to mean the "*first use in the United States* in the manufacture or production of an article intended for sale," etc. Any attempt to broaden the scope of said Section by said regulations is wholly unwarranted, illegal and void. No executive tribunal or official can constitutionally (either with or without the sanction of Congress) make any rule or regulation, the effect of which is to add to, take from, or otherwise change a statute. Such construction by the aforesaid Regulations 48 is simply an attempt by an Executive Officer or Department to write into the statute something which is not there.

On the effective date of said Act taxpayer had on hand certain palm oil, coconut oil, palm kernel oil and sunflower oil which had, prior to said date, been bleached and/or refined in the United States in the manufacture or production of an article intended for sale. Such bleaching and/or refining in the United States prior to said date constituted the first domestic processing of such oils within the contemplation of said Section 602½ and any subsequent processing or use of said oils was not subject to the tax imposed by said Section. The tax has been assessed and collected [fol. 24] from the taxpayer with respect to the subsequent processing or use each month of such bleached and/or refined oils and taxpayer has heretofore filed with the Collector of Internal Revenue, Fifth District of New Jersey, a protest each month against the payment of said tax on such oils, specifying in detail the amount of such oils so subsequently used and the tax paid thereon for each of the months during the period covered by this claim, viz., May 10, 1934 to and including April 30, 1935, to which protests

reference is hereby made. The taxes so assessed and paid upon such oils have been illegally and erroneously assessed and collected and taxpayer is entitled to a refund thereof, with interest.

Attached hereto, marked "Exhibit 2" and made a part hereof, is a schedule by months showing the total taxes paid by the taxpayer to said Collector of Internal Revenue under Section 602½, with the dates of payment thereof and the amount of the taxes so erroneously assessed and collected, aggregating a total of $1,481,694.75. The taxpayer is entitled to a refund of said amount, with interest.

[fol. 25] IN UNITED STATES DISTRICT COURT

PORTIONS OF RECORD—APPEAL NO. 7792

JUDGMENT—April 23, 1941

And now to-wit this 23rd day of April, A. D. 1941, this cause having come on to be heard upon the pleadings filed herein and the Stipulation of Facts filed with the Court on the 27th day of June, A. D. 1940, and having been argued by Counsel for the respective parties and maturely considered by the Court, it is, upon motion of Stewart Lynch, United States Attorney for the District of Delaware,

Ordered, Adjudged and Decreed by the Court that the Complaint filed in this cause be and the same is hereby dismissed with costs to the Defendant and against the Plaintiff to be taxed by the Clerk.

John P. Nields, J.

IN UNITED STATES DISTRICT COURT

NOTE RE OPINION

The cases were consolidated below and but one opinion was written. It appears *ante*, page 1.

[fol. 26] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Aug. 1, 1939 Complaint filed; same day summons issued.
Aug. 1, 1939 Affidavit of E. Ennalls Berl as to service filed.
Aug. 3, 1939 Marshal returns on Summons "Served", &c.; same day writ filed.
Aug. 24, 1939 Defendant appears by Stewart Lynch, Esq., U. S. Attorney; same day præcipe filed.
Sept. 28, 1939 Answer filed.
June 27, 1940 Trial before the Court.
June 27, 1940 Stipulation as to facts filed.

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—June 27, 1940

The parties hereto through their respective Attorneys stipulate the following facts for the purpose of this suit, and for no other purpose.

1. Plaintiff is and at the times mentioned in the complaint was a corporation of the State of Delaware and a resident and citizen of said State, and has its principal office and place of business in the City of Jersey City, State of New Jersey. It is and was at the times mentioned in the complaint engaged in the business of manufacturing and selling soaps and other products in the manufacture of [fol. 27] which it used Palm Kernel Oil, Sunflower Oil, Palm Oil and Coconut Oil, (which oils are hereinafter sometimes referred to as "said oils") the last mentioned oil being of Philippine origin or made from products grown in the Philippine Islands.

2. This is a suit of a civil nature at common law, arising under the Internal Revenue Laws of the United States, and the amount in controversy exceeds the sum or value of $3,000, exclusive of interest and costs. It is a suit against the United States of America for the recovery of certain oil processing taxes alleged by plaintiff to have been erroneously and illegally assessed and collected under Section 602½ of Title IV of the Revenue Act of 1934 which became

effective May 10, 1934, at 11:40 A. M., Eastern Standard Time. Effective at 12:01 A. M., E. S. T., August 21, 1936, Section 702 of Title V of the Revenue Act of 1936 amended Section 602½ of the Revenue Act of 1934.

3. Said taxes were paid under protest in the amounts and at the times hereinafter set forth to the several Collectors of Internal Revenue for the Fifth District of New Jersey, successively in office at the times of said payments, none of whom was in office at the time this suit or proceeding was commenced.

4. This Court has jurisdiction of this suit pursuant to paragraph 20 of Section 24 of the Judicial Code as amended. (28 U. S. C. A. 41 (20).)

5. As shown on the attached Schedule A which is hereby made a part hereof, between June 1, 1935 and February 28, 1937 plaintiff, pursuant to the requirements of Regulations 48 issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, paid, under [fol. 28] protest, taxes aggregating $885,874.56 with respect to the usage, month by month, during the period May 1, 1935 to January 31, 1937, of various processed forms of Coconut Oil, Palm Oil and Palm Kernel Oil, which said oils had, prior to the effective date of Section 602½ of the Revenue Act of 1934, been subjected in the United States to one of the domestic processes hereinafter described in the manufacture or production of an article or articles intended for sale. Said Schedule A shows the aggregate pounds of said oils according to the processed form in which said oils were on the effective date of said Section 602½ of the Revenue Act of 1934, and shows the respective monthly usages on and after May 1, 1935, of such processed forms of said oils, together with the total amount of the tax paid under protest with respect to each month's usage thereof, and the respective dates of payment opposite the respective amounts.

6. The aggregate of 12,466,411 pounds of refined oil and foots (refined Coconut Oil and foots) shown on Schedule A under the column headed "Refined and Foots" had been produced, prior to the effective date of said Section 602½ of the Revenue Act of 1934, by subjecting crude Coconut Oil in the United States to the well-known commercial process of refining which is in common use and is generally re-

ferred to as the "Caustic Soda Process," described as follows:

The operation consists of adding to a known quantity of crude coconut oil a solution of caustic soda or solutions of caustic soda and salt, the amount and concentration of which are computed from a laboratory determination of the free fatty acid content of the crude oil. The crude oil is heated to a predetermined temperature and while the heated oil is being agitated mechanically or by means of [fol. 29] compressed air, the caustic solution is added. The agitation is continued until the operator, by examining samples, observes that the "foots" show a clean break and settle rapidly, whereupon the agitation is stopped and the contents are allowed to settle. After settling and as a result of this process, two products are obtained, viz.: a supernatant layer of clear oil which is commonly known and referred to as "refined Coconut Oil" and the lower layer consisting of what is generally known as "foots." The operator by observing the samples during the refining process, can tell when the mixture is in condition to separate properly and yield the maximum of refined oil. However, samples were sent to the laboratory for testing as to color and free fatty acid content of the refined Coconut Oil. The refined oil produced in such refining process is a different product from the crude oil, the refined oil being much lighter in color than the crude oil and being substantially free from free fatty acid.

The lower layer resulting from the above process, commonly referred to and known as "foots," is a different product from the crude oil originally put into the process; the foots are darker in color than either the original crude oil or the refined oil and consist of a semi-solid mass of soap, water, some refined oil in emulsion and coloring and other organic matter removed from the crude oil in the refining process. On the effective date of Section 602½ of the Revenue Act of 1934 the super-natant layer of clear, refined oil had not been transferred to the storage tanks but remained with the "foots" in the tanks in which the refining process had been conducted, although there was then a clear separation between the refined oil and foots.

7. On and after May 1, 1935, the said 12,466,411 pounds of refined oil and foots shown under the column headed [fol. 30] "Refined and Foots" in Exhibit A hereof were

further processed or used in the United States in the respective quantities and during the respective months as indicated on said Schedule A, and the plaintiff paid the tax under protest at the rate of three cents per pound with respect to such subsequent processing or usage, on the dates as indicated on said Schedule A.

8. The 63,977 pounds of foots (Palm Kernel Oil foots) shown on Schedule A under the column headed "Foots" represent the product obtained in the lower layer from subjecting crude Palm Kernel Oil to the refining process described in Paragraph 6 hereof, which processing was carried on in the United States prior to May 10, 1934.

9. Said 63,997 pounds of foots were subsequently processed or used in the United States after May 1, 1935, viz., during the month of July, 1935, and the tax at the rate of three cents per pound with respect to such subsequent processing or usage was paid under protest by the plaintiff on August 23, 1935, all as indicated on said Schedule A.

10. The 16,998,764 pounds of bleached Palm Oil shown on Schedule A under the column headed "Bleached" had been obtained, prior to May 10, 1934, by subjecting crude Palm Oil in the United States to the well-known commercial process of bleaching known as the "Air Bleaching Process." This process consists in the oxidation of certain coloring matters in the crude oil as the result of which a product different from the crude oil is obtained, which is lighter in color than the crude oil and is generally known and referred to as "bleached palm oil." The "Air Bleaching Process" consists of heating the crude oil to a pre-determined temperature after which air is aspirated or blown through the [fol. 31] heated oil until a sample shows the desired degree of bleaching. When the operator judges the bleaching process complete a sample is tested by the laboratory to ascertain if the bleached oil conforms to the required specifications.

11. The said 16,998,764 pounds of bleached palm oil shown under the column headed "Bleached" on Schedule A hereof were, on and after May 1, 1935, further processed or used by the plaintiff in the United States in the respective months shown on said Schedule and the plaintiff paid a tax, under protest, at the rate of three cents per pound

with respect to such subsequent processing or use on the respective dates shown on said Schedule A.

12. Of the total bleached Palm Oil which plaintiff had on hand on May 10, 1934, obtained by subjecting crude Palm Oil in the United States, prior to said date, to the "Air Bleaching Process" hereinabove described, said 16,998,764 pounds were so processed or used between May 1, 1935 and January 31, 1937, as aforesaid, and 1,568,741 pounds thereof were sold by plaintiff to other persons or corporations from time to time during said period May 1, 1935 to January 31, 1937 inclusive.

13. The processed forms of oils hereinbefore referred to and upon the subsequent processing of which were levied the taxes herein sought to be recovered, continued to be oils in their respective processed forms as hereinabove stated, up to and at the time when they were used as aforesaid after the effective date of Section 602½, said subsequent usage being in each case a use in the manufacture or production of an article or articles intended for sale.

14. Generally, though not always, after each processing of any of said oils, the resulting products were drawn from [fol. 32] the processing tanks by plaintiff and were pumped to storage tanks where the respective processed forms of that particular oil were stored for subsequent usage or sale. When the resulting products had not been transferred to their respective storage tanks on or prior to the effective date of said Section 602½ of the Revenue Act of 1934 and were not stored separately, plaintiff's records and Schedule A hereof show the quantities of the respective products combined as one item: for example, where the refined oil and foots both remained in the same tank on the effective date of said Section 602½ of the Revenue Act of 1934, although there was then a clear separation of the two, plaintiff deemed it expedient, from an accounting standpoint, to combine both items in one account as "Refined Oil and Foots" to which reference has heretofore been made in Paragraph 6 hereof.

15. Of the sum of $885,874.56 paid on account of said taxes alleged to have been erroneously and illegally assessed, the sum of $810,420.15 was paid with respect to usage of the aforesaid oils between May 1, 1935 and August 20, 1936, inclusive, and the sum of $75,454.41 was paid with re-

spect to the usage of the aforesaid oils on or after August 21, 1936.

16. Plaintiff filed with the said Collectors of Internal Revenue for the Fifth District of New Jersey, respectively, a protest ~~each month against~~ the payment of any tax on said subsequent processing of said processed oils, specifying in detail the amounts of such oils so subsequently used during the respective months from May 1, 1935 to January 31, 1937.

17. On June 16, 1939 plaintiff duly filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, New Jersey, a claim for refund of the taxes paid [fol. 33] as aforesaid, plus interest thereon, a true copy of an excerpt therefrom setting forth the basis of said claim being hereto attached and made a part hereof as Schedule B. Said claim for refund was rejected in full by the Commissioner of Internal Revenue on July 14, 1939 and this suit was thereafter timely instituted.

18. If plaintiff is entitled to recover for said taxes assessed and collected during the aforesaid period under Section 602½ of Title IV of the Revenue Act of 1934 and under Section 702 of Title V of the Revenue Act of 1936, it is entitled to recover from the defendant the sum of $885,874.56, plus interest at the rate of six per cent per annum until payment, on the following sums:

On $83,544.75 from June 26, 1935.
On $84,732.87 from July 31, 1935.
On $64,430.10 from August 23, 1935.
On $50,720.91 from September 27, 1935.
On $43,719.03 from October 31, 1935.
On $57,806.13 from November 29, 1935.
On $39,606.06 from December 28, 1935.
On $65,982.18 from January 27, 1936.
On $63,401.49 from February 28, 1936.
On $60,087.15 from March 31, 1936.
On $52,135.29 from April 30, 1936.
On $37,617.30 from May 27, 1936.
On $36,971.67 from June 25, 1936.
On $37,356.87 from July 25, 1936.
On $18,019.14 from August 19, 1936.
On $19,600.32 from September 28, 1936.
On $29,186.79 from October 27, 1936.

On $22,297.32 from November 28, 1936.
On $9,880.74 from December 23, 1936.
On $8,218.38 from January 28, 1937.
On $560.07 from February 27, 1937.

[fol. 34] 19. In administering Section 602½ of the Revenue Act of 1934, the Commissioner of Internal Revenue has always construed said Section to mean that the liability for the tax accrues during the month when the first processing after May 10, 1934 in the United States of the specified oils occurred, in the manufacture of an article intended for sale, irrespective of whether such manufacture was completed during the month of such first processing or whether further processings in such manufacture were necessary and occurred during subsequent months.

20. It is understood and agreed that the facts hereinabove stipulated constitute the entire proof to be offered in this case, provided, however, that in stipulating said facts neither party admits the competency, relevancy or materiality of any of such facts, but each party reserves the right to object to the competency, relevancy or materiality of any stipulated fact, and if any such objection is sustained by the Court the other party shall be at liberty, for purposes of the record, to offer oral testimony or other proof in lieu of the stipulated fact or facts so stricken by the Court.

E. Ennalls Berl, Attorney for Plaintiff. Stewart Lynch, Attorney for Defendant.

Dated: June 27, 1940.

[fol. 35] SCHEDULE "A" TO STIPULATION OF FACTS

Colgate-Palmolive-Peet Company

Table Showing Month by Month Usage in Pounds Between May 1, 1935 and Jan. 31, 1937, of Processed Forms of Vegetable Oils (Coconut, Palm and Palm Kernel) Which Oils Had Been Domestically Processed Prior to the Effective Date of Section 602½ of the Revenue Act of 1934; the Tax Paid Under Protest by Plaintiff with Respect to Such Subsequent Usage, and the Respective Dates of Payment Thereof. The Quantities in Pounds of the Various Oils Are Combined and Grouped According to the Processed Form Thereof.

Period		Foots	Refined & Foots	Bleached	Total Used	Tax Paid	Date of Payment
1935	May	none	940,329	1,844,496	2,784,825	$83,544.75	6-26-35
	June	none	673,218	2,151,211	2,824,429	84,732.87	7-31-35
	July	63,977	487,530	1,596,163	2,147,670	64,430.10	8-23-35
	Aug.		517,096	1,172,601	1,690,697	50,720.91	9-27-35
	Sept.		760,248	697,053	1,457,301	43,719.03	10-31-35
	Oct.		942,940	983,931	1,926,871	57,806.13	11-29-35
	Nov.		1,061,613	258,589	1,320,202	39,606.06	12-28-35
	Dec.		710,446	1,488,960	2,199,406	65,982.18	1-27-36
1936	Jan.		1,098,936	1,014,447	2,113,383	63,401.49	2-28-36
	Feb.		1,139,955	862,950	2,002,905	60,087.15	3-31-36
	Mar.		1,201,282	536,561	1,737,843	52,135.29	4-30-36
	Apr.		957,997	295,913	1,253,910	36,617.30	5-27-36
	May		458,329	774,060	1,232,389	36,971.67	6-25-36
	June		643,183	602,046	1,245,229	37,356.87	7-25-36
	July		287,329	333,309	600,638	18,019.14	8-19-36
	Aug.		265,904	387,440	653,344	19,600.32	9-28-36
	Sept.		275,161	697,732	972,893	29,186.79	10-27-36
	Oct.		64,915	678,329	743,244	22,297.32	11-28-36
	Nov.			329,358	329,358	9,880.74	12-23-36
	Dec.			273,946	273,946	8,218.38	1-28-37
1937	Jan.			18,669	18,669	560.07	2-27-37
		63,977	11,466,411	16,998,764	29,529,152	$885,874.56	

[fol. 36] SCHEDULE B TO STIPULATION OF FACTS

Rider A

Rider Attached to and Made a Part of Claim of Colgate-Palmolive-Peet Company for Refund of Certain Oil Processing Taxes Under Section 602½ of the Revenue Act of 1934 and Under the Amendments of Said Section 602½ Paid by Said Company for the Period May 1, 1935 Through January 31, 1937 Inclusive.

Taxpayer is entitled to the allowance of its claim for refund in the amounts hereinafter stated and for the reasons hereinafter set out.

Regulations 48 issued by the Commissioner of Internal Revenue construe the term "first domestic processing" as used in Section 602½ of the Revenue Act of 1934 and in the amendments of said Section 602½, to mean, with respect to

any of the specified oils not previously taxed, any use in the United States in the manufacture of an article intended for sale which happens to be the *"first use" on and after the effective date of the tax* notwithstanding that the said Section, as enacted and as amended, in explicit language defines said term to mean the *"first use in the United States* in the manufacture or production of an article intended for sale," etc. Such attempt to broaden the scope of said Section by said Regulations is wholly unwarranted, illegal and void. No executive tribunal or officer can constitutionally make any rule or regulation the effect of which is to add to, take from, or otherwise change a statute. Such construction in the aforesaid Regulations 48 is simply an attempt by an Executive Officer or Department to write into the statute something which is not there.

[fol. 37] On the effective date of said Section 602½, viz., May 10, 1934 at 11:40 A. M., Eastern Standard Time, Taxpayer had on hand certain palm oil, coconut oil, palm kernel oil and sunflower seed oil which had prior to said date, been bleached and/or refined in the United States in the manufacture or production of an article intended for sale. Such bleaching and/or refining in the United States prior to said date constituted the "first domestic processing" of such oils within the contemplation of said Section 602½ and any subsequent processing or use of said oils was not subject to the tax imposed by said section. Notwithstanding that such oils had in every instance been first domestically processed and "first used" by Taxpayer in the United States prior to said effective date in the manufacture of products intended for sale, Taxpayer to comply with the apparent purport of Regulations 48 and with rulings of the Bureau of Internal Revenue, reported the subsequent processing or use by it during the period May 1, 1935 through January 31, 1937 inclusive, of such oils so previously processed, and the tax was assessed against and collected from the Taxpayer with respect to such subsequent processing or use. Attached hereto, marked "Exhibit 1" and made a part hereof, is a schedule showing by months the quantities of the respective processed oils so subsequently processed or used by Taxpayer, the total quantities of such processed oils so used by Taxpayer during each month, and the total tax assessed and collected from the Taxpayer with respect to such use. Taxpayer has hereto-

fore filed with the Collector of Internal Revenue, Fifth District of New Jersey a protest each month against the payment of said tax on such processed oils, specifying in detail substantially all of such oils so subsequently used and the [fol. 38] tax paid thereon for each of the months during the period covered by this claim, viz., May 1, 1935 to and including January 31, 1937, to which protests reference is hereby made. The taxes so assessed and collected from Taxpayer with respect to such oils so bleached and/or refined prior to May 10, 1934, have been illegally and erroneously assessed and collected and Taxpayer is entitled to a refund thereof with interest.

Attached hereto, marked "Exhibit 2" and made a part hereof, is a schedule showing by months the total oil processing taxes paid with respect to said period by the Taxpayer to said Collector of Internal Revenue under said Section 602½, with the respective dates of payment thereof, together with the amounts of such payments which were erroneously and illegally assessed and collected with respect to the subsequent processing or use of said oils so processed prior to said effective date, aggregating a total of $885,874.56. Taxpayer is entitled to a refund of said sum of $885,874.56, with interest, from the respective dates of payment.

[fol. 39] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791, 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA

And afterwards, to wit, the 23d day of October, 1941, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 31st day of March, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 40] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791-7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA, Defendant

On Appeals from the District Court of the United States for the District of Delaware

OPINION—Filed March 31, 1942

Before Biggs, Maris and Goodrich, Circuit Judges

BIGGS, Circuit Judge:

The question presented for our determination by the appeals at bar is the construction of Section 602½, c. 277 of the Revenue Act of 1934, 48 Stat. 680, 26 U. S. C. A. Internal Revenue Acts p. 778.

The appellant makes soaps and other products and uses coconut oil, palm oil and other oils in their manufacture. [fol. 41] On May 10, 1934, the effective date of Section 602½, it had on hand over 78,000,000 pounds of coconut and other oils referred to in the statute which had received one or more domestic processings. After the effective date of the statute these oils were subjected to further processings by the appellant in the manufacture of products intended for sale. The appellant paid the taxes and made claims for refunds which were rejected by the Commissioner. The appellant then sued the United States.

The court below held that the phrases of the statute, "first domestic processing" and "first use", mean the first domestic processing or first use in the United States after the effective date of the act. See Colgate-Palmolive-Peet Company v. United States, 37 F. Supp. 794. The pertinent portions of Section 602½ are set out in the margin.[1] There

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[1] Section 602½ provides:

"Processing Tax on Certain Oils.

'(a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sentence) a tax of 2 cents per pound to be paid by the processor, upon the first domestic processing of coconut oil or of any combination or mixture containing a substantial quantity of coconut oil with respect to which oil there has been no previous first domestic processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such coconut oil (whether or not contained in such a combination or mixture), (A) is wholly the production of the Philippine Islands or any other possession of the United States, or (B) was produced wholly from materials the growth or production of the Philippine Islands or any other possession of the United States, or (C) was brought into the United States on or be-

[fol. 42] is no dispute between the parties as to the meaning of the phrases "domestic processing" or "use in the United States". All concede that the oils subjected to the tax, were processed in the United States both before and after the effective date of the act. The dispute arises as to the meaning of the phrase "the first" as used throughout the statute.

The appellant makes a number of contentions. It refers to the word "first" as defined in Funk & Wagnall's New Standard Dictionary, 1938, as meaning "Prior to all others in time or occurrence; earliest, as the first snow of the season." To this may be added the definition contained in Webster's New International Dictionary, Second Edition, viz., "Preceding all others; foremost;—used as an ordinal of *one;* as (a) earliest in time or succession;—said of either

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fore the 30th day after the date of the enactment of this Act or produced from materials brought into the United States on or before the 30th day after the date of enactment of this Act, or (D) was purchased under a bona fide co-tract entered into prior to April 26, 1934, or produced from materials purchased under a bona fide contract entered into prior to April 26, 1934. All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

Subdivision (1) of Article 1 of Regulations 48 provides:

"(1) First domestic processing means the first use in the United States on or after the effective date of the Act. At all times in these regulations, the term processing or first domestic processing will be deemed to be synonymous with 'use' or 'first use in the United States on or after the effective date', respectively, and will include the meanings implied in the latter terms by subdivision (k) above."

the past or future, as he was the *first* to come; the *first* train leaves at noon; my *first* voyage; the *first* year of Independence; (b) foremost in position;—in front of or in advance of all others; as *first* in the race; . . ." The appellant urges that if the modifying adjective "first" be given its ordinary or normal meaning it must refer to the earliest use of processing in the United States, that which precedes all others in point of time. This interpretation, says the appellant, is the same as that which the Treasury Department put upon the phrase, "'the first domestic processing" used in Section 9(a) of the Agricultural Adjustment Act, ap-[fol. 43] proved May 12, 1933, c. 25, 48 Stat. 31, 7 U. S. C. A. § 609(a). The appellant contends that Section 602½ of the Revenue Act of 1934 was derived from Section 9(a) of the Agricultural Adjustment Act.

We entertain little doubt that the provisions of Section 602½ were derived largely from Section 9(a). The Treasury Regulations (Article 7 of Treasury Regulations 81, approved July 12, 1933) and the amendments thereto promulgated by the Treasury Department in connection with Section 9(a) of the Agricultural Adjustment Act bear out the appellant's assertion that the Treasury Department construed the phrase "the first domestic processing" to mean the first in point of time.[2] If the provisions of Sec-

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[2] Article 7 of Regulations 81, approved July 12, 1933, promulgated under the Agricultural Adjustment Act, provides:

"When tax attaches.—The tax attaches upon the first domestic processing of the commodity. Where some part of the first domestic processing of a particular quantity of the commodity takes place during the period when the tax is effective, the tax attaches notwithstanding that some portion of the first domestic processing of such quantity takes place before or after such period."

The foregoing was amended on September 20, 1933 by T. D. 4392, Article 7 (See C. B. XII-2, p. 430) to read as follows:

"When tax attaches.—The tax attaches at the beginning of the first domestic processing of the commodity. When the first domestic processing begins before the effective date, no tax attaches, although it is not completed until after the effective date. When the first domestic processing begins while the tax is in effect, it is subject to the proc-

tions 9(a) and 602½ are deemed to be in *pari materia* the [fol. 44] two sections should be interpreted similarly. While the Agricultural Adjustment Act placed a floor tax upon commodities already processed (See Supplementary Revenue Provisions of the Agricultural Adjustment Act, Section 16(a), c. 25, 48 Stat. 40 and the last regulation cited in note 2 supra), Congress did not impose any floor tax under the Revenue Act of 1934. Because of this Section 9(a) and Section 602½ cannot be deemed to be in *pari materia* even if the commodities named in Section 9(a) be deemed to be the equivalent for tax purposes of the oils referred to in Section 602½.

The appellant contends that the history of the section shows that it was the purpose of Congress to protect domestic farm products against competitive oils brought into this country by levying a compensating tax on the first actual use of such oils within the United States. The appellant takes the position that Congress did not intend to tax any processing after the first processing in point of time in the United States because such a tax would not effectuate the purpose of Section 602½ which is a substitute for an impost. The appellant points out that when the Revenue Act of 1928, 45 Stat. 791, was under consideration unsuccessful attempts were made by members of Congress from agricultural and cattle-raising states to impose duties

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essing tax, notwithstanding it is not completed until after the tax is terminated."

Article 7 was again amended on November 2, 1933, by T. D. 4403 (See C. B. XII-2, p. 430) to be effective retroactively to July 9, 1933. Article 7 in its final form provides:

"When tax attaches.—The tax is imposed upon the first domestic processing, and is measured by the amount of the commodity put into such processing. The tax attaches to a particular quantity of the commodity (1) if it is in process on the effective date, provided the first domestic processing has not been completed prior to that date, or (2) if the first domestic processing is begun during the period while the tax is in effect, provided it is completed before the termination of the tax. Where the first domestic processing of a particular quantity of the commodity is completed prior to the effective date, but on the effective date such quantity is in secondary processing, it is subject to the tax on floor stocks (see Regulations 82)."

upon imported competitive oils including coconut oil. These proposed amendments were rejected.[3] In 1929 when the Tariff Act of 1930, 46 Stat. 590, 19 U. S. C. A. § 1001, was again before Congress, amendments were offered to place imports upon competing foreign oils.[4] These proposals were not made law. When Congress had before it the Revenue Act of 1932, 47 Stat. 169, similar amendments were proposed but were rejected again.[5] During the Seventy-Second Congress a separate bill, H. R. 12,835, was introduced to provide an amendment to the Tariff Act of 1930 in order to impose a duty on such oils as were processed in the case at bar. This bill did not pass.

[fol. 45] The continuous agitation for the protection of domestic farm products from duty-free coconut oil and other competitive vegetable oils resulted in the passage of the statute under consideration. See the statements of Congressman Schallenberger,[6] those of Congressman Knutson,[7] those of Senator Byrnes,[8] those of Senator Borah[9] and those of Senator Norris.[10] The fact that the Philippine Independence Act of March 24, 1934, c. 84, Section 6(b), 48 Stat. 456, 459, 48 U. S. C. A. 1236(b), specifically authorized the importation free of duty of 200,000 long tons of Philippine coconut oil a year for ten years made it impossible for Congress to place an impost on Philippine coconut oil without a breach of faith. Congress, in order to protect the American farmer, but also to keep faith with the people of the Philippines, substituted for an impost upon Philippine oil the tax provided by Section 602½. It follows, says the appellant, that Congress intended the tax of 602½ to attach to the earliest use of the oils after entry into the United States and therefore Congress intended to levy the tax upon "the first domestic processing" in point of time.

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[3] See Cong. Record, Vol. 69, pp. 8483, 9202.

[4] See Cong. Record, Vol. 71, p. 4914, et seq.; Vol. 72, pp. 5717, 5942.

[5] See Cong. Record, Vol. 75, pp. 10,249 et seq., 11,095-11,116.

[6] See Cong. Record, Vol. 78, p. 2529.

[7] See Cong. Record, Vol. 78, pp. 2614, 2615.

[8] See Cong. Record, Vol. 78, p. 6314.

[9] See Cong. Record, Vol. 78, p. 6316.

[10] See Cong. Record, Vol. 78, p. 6380.

Our difficulty in accepting these arguments lies in the fact that we can see no reason why Congress should not have desired to protect domestic fats against competitive imported oils whether prior to the passage of the act these had been processed within the United States or not. Obviously Congress could have made its intention very plain by adding a very few words to the phrase "first domestic processing" such as "in point of time", if that body had in mind the end which the appellant contends it had. Upon the other hand if we take the literal meaning of the word "first", we must concede that it means in advance of all others, the earliest.

[fol. 46] Two plain sign posts remain to guide us. First, as was stated by the learned trial judge a statute is presumed to operate on future acts unless the contrary intent is declared. See Hassett v. Welch, 303 U. S. 303, 314. A similar view was expressed by the Circuit Court of Appeals for the Second Circuit in Loose-Wiles Biscuit Co. v. Rasquin, 95 F. (2nd) 438, 440, cert. den. 305 U. S. 611. The Court of Claims in the case of Tasty Baking Co. v. United States, 38 F. Supp. 844, reached a similar conclusion, though upon somewhat different reasoning. In our opinion the doctrine of the prospective operation of a statute has become so much a part of our law as to require Congress to employ plain words to overcome the presumption that a statute will so operate.

Second, Treasury Regulations 48 (see note 1, supra) construe the phrase "first domestic processing" as meaning the first use in the United States after the effective date of the Act. The defendant points out that these regulations were promulgated by the Treasury Department pursuant to the provisions of Section 1101 of the Revenue Act of 1926. See 44 Stat. 111. Sec. 602½(f) of the Revenue Act of 1934, 48 Stat., 764, provides that all provisions of Section 600 of the Revenue Act of 1926, 44 Stat. 93, not inconsistent with the provisions of Sec. 602½ of the Revenue Act of 1934 shall be applicable in respect to the taxes imposed by Section 602½. In effect, therefore, contends the defendant, Treasury Regulations 48 were made applicable to Section 602½ of the Revenue Act of 1934. Since the promulgation of the regulations referred to Congress on one occasion amended Section 602½ without any indication of disapproval of the interpretation of the Treasury Department as to the prospective operation of the statute.

By Section 402 of the Revenue Act of 1935, 49 Stat. 1026, Congress imposed a compensatory tax upon the importation of articles produced from the oils named in Section 602½.

The United States claims similar approval by Congress by the enactment of Section 702 of the Revenue Act of 1936, 49 Stat. 1742, amending Section 602½ (a). This con- [fol. 47] tention cannot be sustained, however, because Congress made substantial changes in the wording of Section 602½ though it did refer specifically to the existing regulations in respect to definitions of combinations or mixtures.[11] This may indicate some degree of approval by Congress of the interpretation by the regulations of the prospective action of Section 602½ (a) as enacted in the Revenue Act of 1934, but since the statute was not reenacted in identical language the rule of congressional confirmation enunciated by Brewster v. Gage, 280 U. S. 327, 337, and Mass. Mufual Life Ins. Co. v. United States, 288 U. S. 269, 273, cannot be applied.

We have given careful consideration to the appellant's argument in respect to the 1936 amendment. Put briefly it is as follows. As we have already indicated Section 702(a) of the 1936 Revenue Act amended Section 602½ of the Revenue Act of 1934. As the amendment was originally proposed by the Senate Finance Committee and passed by the Senate,[12] it stated in part, "There is hereby imposed upon the first domestic processing of coconut oil, palm oil . . .; fatty acids . . . (whether or not . . . refined . . . or otherwise processed), or any combination or mixture [thereof] . . ., with respect to any of which . . . there has been no previous first domestic processing and no import tax has been paid . . . a tax of 3 cents per pound to be paid by the processor." These words were apparently insufficient to express the intent of Congress for the bill was rewritten in committee and the words "taxed under this section" was added to the phrase "no previous domestic processing". The addition of this phrase, says the appellant, resulted in two classifications of "previous first domestic processings", viz., a class of those previous processings which had been taxed under the section and which, accord-

[11] See S. Rep. No. 2156, 74th Cong., 2nd Sess. p. 30 (1939-1 Cum. Bull. (Part 678, 698)).

[12] See Cong. Rec. Vol. 80, p. 8786.

ingly, must have occurred *subsequent* to the effective date of the Revenue Act of 1934, and a second class of previous first domestic processings not taxed under the section [fol. 48] which could have occurred only *prior* to the effective date of the Revenue Act of 1934.

Study of the 1936 amendment leads, we think, to the opposite conclusion. Congress intended to tax oils of the designated classes or combinations which had not been previously taxed under Section 602½ (a) or upon which an import tax had not been paid under Section 601(c) (8) of the Revenue Act of 1932. In short we think that the amendment shows it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not. It follows that Congress intended oils or combinations processed subsequent to the effective date of the 1934 Revenue Act to be taxed.

The question posed for our determination is a difficult one. Following the two sign posts to which we have referred we conclude that the District Court reached the right result.

Accordingly, the judgments are affirmed.

A true copy:
Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 49] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1941

No. 7791

Colgate-Palmolive-Peet Company, Appellant,

vs.

United States of America, Appellee

On Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

March 31, 1942.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Affirming Judgment. Received and Filed March 31, 1942. Wm. P. Rowland, Clerk.

[fol. 50] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7792

COLGATE-PALMOLIVE-PEET COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

On Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

March 31, 1942.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Affirming Judgment. Received and Filed March 31, 1942. Wm. P. Rowland, Clerk.

[fol. 51] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 7791 and 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA, Defendant-Appellee

ORDER EXTENDING TIME FOR PETITION FOR REHEARING

Before Biggs, and Goodrich, Circuit Judges

It is hereby Ordered that the time for filing petition for rehearing in the above entitled cases be and the same is hereby extended for an additional fifteen days.

April 6, 1942.

For the Court, John Biggs, Jr., Circuit Judge.

Endorsements: Order extending time for filing Petition for Rehearing. Received and Filed April 6, 1942. Wm. P. Rowland, Clerk.

[fol. 52] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791 and 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA, Defendant

PETITION FOR REHEARING

The appellant respectfully petitions for a rehearing on the following grounds:

1. The Court overlooked that the specific aim of Congress, as expressed in the debates, was the limitation of future imports and not taxation of oils on hand; there was no occasion to resort to a novel and, we submit, an erroneous application of the principle of the prospective operation of statutes.

2. The Court has distorted the principle of prospective operation of statutes, and has applied it to the exclusion of other established canons of construction.

3. When the intent of Congress is made plain by the debates, to resort to a dubious use of an abstract canon of construction becomes completely unrealistic.

[fol. 53] 4. The view (Opinion, p. 7) that Treasury Regulations 48 were in effect adopted and ratified by the Revenue Act of 1934 and made applicable to Section 602½ thereof is based on the erroneous premise that those Regulations were promulgated prior to the enactment of that Act whereas the fact is that they were issued after its enactment.

5. The Court erred in holding that Section 402 of the Revenue Act of 1935 constituted an amendment of Section 602½ of the Revenue Act of 1934 and accordingly erred in holding that it constituted legislative approval of the Treasury Department's interpretation of Section 602½.

6. The Court misapprehended the facts relating to the 1936 Amendment of Section 602½ and consequently failed to give effect to distinctions made therein by Congress.

7. The omission from Section 602½ of the supplementary floor stock tax found in the Agricultural Adjustment Act does not indicate that the phrase "the first domestic processing" is to be taken in a different sense in Section 602½ from that in which it was employed in the A. A. A.

[fol. 54] Conclusion

It is, therefore, respectfully urged that this petition for a rehearing should be granted.

Respectfully submitted, E. Ennalls Berl, Attorney for Appellant-Petitioner, Delaware Trust Building, Wilmington, Delaware.

Albert C. Wall, Mason Trowbridge, Blevins C. Dunklin, Edward J. O'Mara, Of Counsel.

Certificate of Counsel

E. Ennalls Berl, attorney for the above named petitioner-appellant, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

E. Ennalls Berl, Attorney for Petitioner-Appellant.

[fol. 55] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7791

COLGATE-PALMOLIVE-PEET CO., Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

SUR PETITION FOR REHEARING

And Now, to wit, June 3, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted, and the case set for rehearing on Monday, June 15, 1942.

Philadelphia.

John Biggs, Jr., Circuit Judge.

Endorsements: Order granting petition for rehearing. Received & Filed June 3, 1942. Wm. P. Rowland, Clerk.

[fol. 56] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7792

COLGATE-PALMOLIVE-PEET CO., Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

SUR PETITION FOR REHEARING

And Now, to wit June 3, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted, and the case set for rehearing on Monday, June 15, 1942.

Philadelphia.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Granting Rehearing Received and filed June 3, 1942. Wm. P. Rowland, Clerk.

[fol. 57] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791, 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA

And afterwards, to wit, the 15th day of June, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 21st day of August, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 58] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791-7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant

On Appeals from the District Court of the United States for the District of Delaware

OPINION ON REHEARING—Filed August 21, 1942

Before Biggs, Maris and Goodrich, Circuit Judges

BIGGS, Circuit Judge:

After careful reconsideration of this case on reargument a majority of the court feel constrained to reach the same decision as that expressed in our first opinion. The opin-

ion, however, contains two errors which should be corrected.

We stated in our opinion, "Since the promulgation of the regulations referred to [Treasury Regulations 48] Congress on one occasion amended Section 602½ without any [fol. 59] indication of disapproval of the interpretation of the Treasury Department as to the prospective operation of the statute.", and we went on to say that Congress by Section 402 of the Revenue Act of 1935, 49 Stat. 1026, imposed a compensatory tax upon the importation of articles produced from the oils named in Section 602½. Obviously, the word "amended" was used erroneously. Congress did not amend Section 602½, but it dealt with a subject matter closely allied to that contained in Section 602½ and in doing so indicated no disapproval of the interpretation put upon that section by the Treasury Department in Regulations 48. We think that these facts furnish some evidence that Congress was not dissatisfied with the Treasury Department's interpretation providing prospective operation for Section 602½.

We stated also that the appellee claimed approval by Congress of Regulations 48 by reason of the enactment of Section 702 of the Revenue Act of 1936, 49 Stat. 1742 amending Section 602½. We concluded that the appellee's contention could not be sustained "* * * because Congress made substantial changes in the wording of Section 602½, though it did refer specifically to the existing regulations in respect to definitions of combinations or mixtures." We think we adopted too narrow a view of the doctrine of implicit approval by Congress of departmental interpretations of statutes by reenactment of their provisions by subsequent legislation. In Loose-Wiles Biscuit Co. v. Rasquin, 95 F. (2nd) 438, Judge Chase ruled correctly upon this subject and upon this very statute. He considered that Congress had tacitly approved the Treasury interpretation of Section 602½ by Regulations 48 because it enacted Section 702 of the Revenue Act of 1936. See also Helvering v. Wilshire Oil Co., 308 U. S. 90, 100. Compare Textile Mills Corp. v. Commissioner, 304 U. S. 326, 335-339. It is sufficient if an amendment dealing with substantially the same subject matter as the amended statute makes no change indicating disapproval by Congress of existing departmental interpretation.

[fol. 60] After consideration of every point raised by the appellant we can perceive no reason why our prior decision should be altered. Accordingly the judgments will be affirmed.

MARIS, Circuit Judge, dissenting:

After full consideration of the arguments advanced upon the rehearing of this case I find myself constrained to dissent from the judgment of the court. In my view the construction placed by the majority of the court upon Section 602½ of the Revenue Act of 1934 cannot be supported either by its language or by the intent of its framers as shown by its legislative history. I shall briefly set forth the reasons for my view.

In the first place the phrase "first domestic processing" seems to me to be wholly free from ambiguity. "First", when used as here in respect of time, means earliest in point of time. If no reference point in time is specified the reference must be to the beginning of time. The majority say that another reference point, the effective date of the act, was intended. But it is not so expressed in the act and I find no convincing evidence that Congress so intended.

The provisions of Section 602½ were derived largely from Section 9(a) of the Agricultural Adjustment Act of May 12, 1933 and the phrase "first domestic processing" was taken verbatim therefrom. It is conceded that in the Agricultural Adjustment Act the word "first" was used in the absolute sense of earliest in time. I find nothing to indicate that Congress did not intend to use the word in the same sense when it included the phrase in Section 602½. Furthermore when Congress in the Revenue Act of 1936 amended Section 602½ it indicated by the use of the phrase "first domestic processing taxed under this section" that it recognized that not all first domestic processings were taxable.

Secondly the legislative history of Section 602½ convinces me, as it convinced Judge Sullivan in Durkee Famous [fol. 61] Foods v. Harrison, — F. Supp. — (D. C. Ill. 1942), that it was the purpose of Congress to protect domestic farm products against competition from specified oils which were brought from outside the United States, by levying a tax on their first use within the United States. As Judge Sulli-

van pointed out in the case just cited: "The Philippine Independence Act had been passed on March 24th, 1934, (48 U. S. C. A. 1236 (b)) specifically authorizing the importation, free of duty, of a designated amount of coconut oil each year for a period of ten years, thus precluding Congress from placing an import duty thereon. Therefore, the amendments to subdivision (a) of Section 602½, as adopted, provided for (1) a surtax of two cents per pound on coconut oil of non-Philippine origin; and (2) provided for the segregation and payment into the Philippine treasury of the entire tax collected on Philippine coconut oil. Tracing the progress of the oil processing tax statute from its inception as Section 602 of the Revenue Act of 1934, to its final enactment as Section 602½ thereof, the Congressional debates and reports all evidence the same legislative purpose of protecting the American farmers' products against oils brought in from outside the United States. The debates show that it was the intention of Congress, in enacting Section 602½, to extend to foreign oils the same type of processing tax as had already been levied upon the American farmers' products by the Agricultural Adjustment Act, and to use such tax as a substitute for a protective tariff. • • • Congressional Record, Vol. 78, pages 2513-2529; 2614-2658; 6308-6324-6314-6315-6380."

The majority rely for their decision largely upon two guide posts but these do not seem to me to point to the conclusion which the majority reach. The first is the rule that a statute is presumed to operate prospectively unless the contrary intent is declared. I am quite willing to concede that this rule is applicable to Section 602½. Its application, however, should merely result in imposing the tax upon those processings within the statutory definition which actually took place after the effective date of the act, not in [fol. 62] modifying the definition so as to impose the tax upon transactions which upon the normal application of the rule would have been exempt.

The second guide post to which the majority refer is Treasury Regulation 48 interpreting Section 602½. The regulation defines "first domestic processing" as "the first use in the United States on or after the effective date of the act." But the act itself defined "first domestic processing" as "the first use in the United States, in the manufacture

or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate." It will be observed that in the statutory definition there is no suggestion of a reference to the effective date of the act. It seems to me that in importing such a reference the regulation goes beyond its rightful field of interpretation and into the realm of amendment. Consequently I think that the regulation is invalid and that its application violates the settled rule, to which, however, the courts too frequently pay only lip service, that ambiguities in a revenue statute must be construed strictly against the Government and that doubts therein must be resolved in favor of the taxpayer.

A true Copy. Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 63] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7791

COLGATE-PALMOLIVE-PEET COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA

On Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

John Biggs, Jr., Circuit Judge.

August 21, 1942.

Endorsements: Order Affirming Judgment. Received & Filed Aug. 21, 1942. Wm. P. Rowland, Clerk.

[fol. 64] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7792

COLGATE-PALMOLIVE-PEET COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA

On Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

John Biggs, Jr., Circuit Judge.

August 21, 1942.

Endorsements: Order Affirming Judgment. Received & Filed Aug. 21, 1942. Wm. P. Rowland, Clerk.

[fol. 65] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 7791 and 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Coram: Biggs and Goodrich, Circuit Judges

Upon application of counsel for appellant it is hereby Ordered that the time for filing a petition for rehearing in the above entitled cause be and the same hereby is extended to and including October 5, 1942.

For the Court, John Biggs, Jr., Circuit Judge.

September 3, 1942.

Endorsements—Order Extending Appellant's Time for Filing Petition for Rehearing to October 5, 1942. Received & Filed Sept. 3, 1942. Wm. P. Rowland, Clerk.

[fol. 66] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791 and 7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant

PETITION FOR SECOND REHEARING

The appellant respectfully petitions (a) for a second rehearing *en banc* (in view of the fact that the rule of approval by statutory reenactment or amendment as announced by a majority of the Court in this case is at variance with the rule heretofore announced by this Court, as well as in view of the other grounds below) or (b) if that be not granted, for a second rehearing by the Court as heretofore constituted in this case. The right of the Court to sit *en banc* is well settled. (*Textile Mills Corp.* v. *Commissioner*, 117 F. (2d) 62; affirmed 314 U. S. 326, 86 L. Ed. 242.) This petition is made upon the following grounds:

1. The majority of the Court are mistaken as to the facts respecting the 1936 amendment.

2. Presumably under the influence of that mistake the majority have failed to give full meaning and effect to all [fol. 67] the words of that amendment, as under established rules of construction should be done. That amendment cannot possibly constitute legislative approval of the Commissioner's regulation interpreting "first" to mean "first after the effective date of the tax".

3. The conclusion of the Court with respect to legislative approval is not sustained by either of the cases cited in the majority opinion on rehearing.

4. The rule adopted in the majority opinion is contrary to the rule of approval by re-enactment as stated and applied by the Supreme Court.

5. The rule of approval by amendment announced in the majority opinion is contrary to the rule heretofore

announced in this Court and leaves the law on that point in this Circuit in doubt.

6. The majority of the Court erred in holding that the principle of prospective operation of statutes requires that "first" be construed as meaning "first after the effective date of the tax."

7. The majority of the Court erred in rejecting the factual indicia of the intent of Congress. The Court recognizes that Section 602½ was derived largely from the Agricultural Adjustment Act and that "the first domestic processing" was there construed to mean the first in point of time; but the majority of the Court holds that the same language in Section 602½, intended to supplement the Agricultural Adjustment Act, should not be similarly construed.

8. The majority of the Court erred in refusing to apply the principle of doubt.

Counsel appreciate the great consideration which the Court has already extended to appellant. We should not [fol. 68] under ordinary circumstances ask any further indulgence. But the circumstances are not ordinary. A tax question has been decided against the taxpayer on factual grounds which are erroneous and on applications of legal principles which are unprecedented.

Conclusion

It is, therefore, respectfully urged that this petition for a second rehearing should be granted.

Respectfully submitted, E. Ennalls Berl, Attorney for Petitioner-Appellant, Delaware Trust Building, Wilmington, Delaware.

Albert C. Wall, Mason Trowbridge, Blevins C. Dunklin, Edward J. O'Mara, of Counsel.

Certificate of Counsel

E. Ennalls Berl, attorney for the above named petitioner-appellant, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

E. Ennalls Berl, Attorney for Petitioner-Appellant.

[fol. 69] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7791-7792

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant

ORDER

Coram Biggs and Goodrich, Circuit Judges

And now, to-wit, this 10th day of November, 1942, it is Ordered that the phrase "two errors" appearing in the first paragraph of the Opinion on Rehearing filed herein on August 21, 1942 be and the same hereby is stricken out and the phrase "an error" be and the same hereby is substituted in lieu thereof; and it is

Further Ordered that the last sentence of the second paragraph of the Opinion on Rehearing be and the same hereby [fol. 70] is stricken out; and it is

Further Ordered that the third paragraph of the Opinion on Rehearing be and the same hereby is stricken out; and it is

Further Ordered that the petition for a second rehearing be and the same hereby is denied.

For the Court (S.) John Biggs, Jr., U. S. Circuit Judge.

Endorsements—Order Amending Opinion of the Court on Rehearing. Order Denying Petition for Second Rehearing. Received & Filed November 11, 1942. Wm. P. Rowland, Clerk.

[fol. 71] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before this court at argument; and pro-

ceedings in this court in the cases of Colgate-Palmolive-Peet Company, appellant, vs. United States of America, Nos. 7791 and 7792, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 12th day of November in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-seventh.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 62] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

Nos. —

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff and Petitioner,

v.

UNITED STATES OF AMERICA, Defendant

Order Extending Time Within Which to File Petition for Writ of Certiorari

On consideration of the motion of counsel for plaintiff-petitioner in the above entitled cause, and good cause therefor having been shown,

It Is Now Here Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from and after February 10, 1943.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

Dated this 3rd day of February, 1943.

[fol. 63] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 38

[Title omitted]

ORDER ALLOWING CERTIORARI—June 14, 1943

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

It is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, and the case is transferred to the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 14, 1943.

Mr. Justice Roberts took no part in the consideration or decision of this application.

[fol. 64] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 39

[Title omitted]

ORDER ALLOWING CERTIORARI—June 14, 1943

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

It is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, and the case is transferred to the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 14, 1943.

Mr. Justice Roberts took no part in the consideration or decision of this application.

Endorsed on Cover: File Nos. 47,408, 47,409. U. S. Circuit Court of Appeals, Third Circuit. Term No. 38. Colgate-Palmolive-Peet Company, Petitioner, vs. The United States of America. Term No. 39. Colgate-Palmolive-Peet Company, Petitioner, vs. The United States of America. Petition for writs of certiorari and exhibit thereto. Filed April 10, 1943. Term No. 38 O. T. 1943, 39 O. T. 1943.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1942

Nos. ~~907 - 908~~ 38 - 39

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF.

E. ENNALLS BERL,
Attorney for Petitioner,
Delaware Trust Building,
Wilmington, Delaware.

ALBERT C. WALL,
MASON TROWBRIDGE,
BLEVINS C. DUNKLIN,
EDWARD J. O'MARA,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1942

Nos.

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Colgate-Palmolive-Peet Company, respectfully prays that a Writ of Certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit entered in the above causes affirming the judgments of the United States District Court for the District of Delaware. A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith.

Summary and Short Statement of the Matter Involved.

These are suits to recover taxes paid under protest under Section 602½(a) of the Revenue Act of 1934, the pertinent part of which reads as follows:

> "Sec. 602½. Processing Tax on Certain Oils.
>
> (a) There is hereby imposed upon *the first domestic processing* of coconut oil, sesame oil, palm oil, palm-kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. * * * For the purposes of this section the term 'first domestic processing' means *the first use in the United States*, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed * * *."*

On August 17, 1934, the Commissioner of Internal Revenue issued Regulations 48 under Section 602½. Subdivision (l) of Article 1 of the Regulations interprets the phrase "the first domestic processing" as used in Section 602½ as follows:

> "(l) First domestic processing means the first use in the United States *on or after the effective date of the Act*. At all times in these regulations, the term processing or first domestic processing will be deemed to be synonymous with 'use' or 'first use in the United States *on or after* the effective date', respectively, and will include the meanings implied in the latter terms by subdivision (k) above."

---

* Where italics are used in quotations, it will be understood that the emphasis is ours unless otherwise noted.

All the facts with reference to the oils involved in these suits are stipulated (Rec. pp. 10-24, 26-38).

On May 10, 1934, the day on which Section 602½ became effective, petitioner had on hand oils specified in that section which had already received from one to four processings within the United States, all of which processings are recognized in Regulations 48 (and by the Court below) as domestic processings within the meaning of Section 602½. However, pursuant to the above regulation the Commissioner levied a tax under Section 602½ on the further processing of those oils after May 10, 1934, although the processing so taxed was in each case either the second, third, fourth or fifth processing in the United States. It is the taxes so levied which petitioner seeks to recover.

The first suit involves taxes in the amount of $1,476,507.81 paid by petitioner with respect to the further processing during the period May 10, 1934—April 30, 1935, inclusive, of oils which had already received one to four domestic processings prior to the effective date of the statute, each of which processings constituted a use of the oil in the manufacture of articles intended for sale. Similarly, the second suit involves $885,874.56 of taxes paid by plaintiff with respect to the further processing during the period May 1, 1935—January 31, 1937, inclusive, of similar processed forms of oils which had likewise been first used (first domestically processed) prior to the effective date of the statute, in the manufacture of articles intended for sale. Both suits were brought pursuant to Paragraph 20 of Section 24 of the Judicial Code, as amended February 24, 1925 (43 Stat. 972 Ch. 309, 28 U. S. C. A. 41 (20)).

The suits were consolidated for trial upon Stipulations of Facts. The District Court rendered its opinion on March 20, 1941 (Rec. pp. 1-8), reported in 37 F. Supp. 794,

and held that the Act should be construed to mean that the tax was to be levied on the "first domestic processing" after the effective date of the Act notwithstanding there had been actual domestic processings before that time and that, consequently, the taxes had been properly levied and collected. On April 23, 1941, judgments were entered dismissing the complaints (Rec. pp. 1, 25) and on July 19, 1941, appeals were taken to the Circuit Court of Appeals for the Third Circuit.

On March 31, 1942, the Circuit Court of Appeals filed its unanimous opinion sustaining the District Court, and judgment of affirmance was entered. Thereupon, on appellant's petition, a rehearing was had and on August 21, 1942, the Circuit Court of Appeals filed a *majority* opinion again sustaining the District Court and judgment of affirmance was again entered. Judge MARIS, who had concurred in the original opinion and affirmance, dissented and filed a separate opinion. Opinions reported in 130 F. (2d) 913.. A Petition for a Second Rehearing was entertained but denied by Order Entered November 11, 1942. By Order dated February 3, 1943, entered by Mr. Justice ROBERTS, petitioner's time for filing this application for a Writ of Certiorari was extended to and including April 10, 1943.

Statement of Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13, 1925, Section 347 of Title 28 of U. S. C. A.

Questions Presented.

1. Do Regulations 48 issued by the Commissioner of Internal Revenue correctly interpret the taxing phrase "the first domestic processing" in Section 602½ of the Revenue Act of 1934 (specifically defined therein as "*The first use in the United States* in the manufacture of an article intended for sale") as meaning "the first use in the United States *on and after effective date of the act?*"

2. Did the Court below err in holding that the rule of prospective operation of statutes requires an interpretation of the word "first" as meaning "first *after the effective date of the tax*" and justifies the interpolation of the words above italicized, or should its application "merely result in imposing the tax upon those processings within the statutory definition which actually took place after the effective date of the act, not in modifying the definition so as to impose the tax upon transactions which upon the normal application of the rule would have been exempt" as stated by Judge MARIS in his dissenting opinion?

3. Did the Court below err in holding that an amendment of Section 602½ passed in 1936 shows that Congress intended the first domestic processing to mean the first such processing after May 10, 1934 (which is in effect a holding that every "first domestic processing" is a taxable processing), when the express language of the 1936 amendment recognizes in exemption clauses (1) and (2) thereof that there would be previous first domestic processings taxed under this section and previous first domestic processings which were untaxed?

4. Did the Court below err in failing to apply the principle that doubts as to the construction of tax statutes should be resolved in favor of the taxpayer?

Reasons Relied Upon for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Third Circuit has decided a federal question, viz., the meaning of a federal statute, in a way which is in conflict with applicable decisions of this Court in that it has arrived at the meaning which it attributes to the statute by a distorted and wholly novel application of the rule of prospective operation of statutes at variance with the statement and application of that rule in cases heretofore decided by this Court. The Court below has used the rule of the prospective operation of a statute as a reason for interpolating words into an enactment, *i. e.*, as a reason for construing the words "the first" as meaning "the first after the effective date of the tax" whereas that rule as established by this Court merely means in a case of this character that the tax shall apply only to those transactions coming within the statutory definition which occur on and after the effective date of the tax, and shall not apply retroactively to transactions occurring prior to said date. "Ordinarily statutes establish rules for the future, and they will not be applied retroactively unless that purpose plainly appears" (*Brewster* v. *Gage*, 280 U. S. 327, 337); "The initial admonition is that laws are not to be considered as applying to cases which arise before their passage unless that intention be clearly declared." (*Shwab* v. *Doyle*, 258 U. S. 529, 534.)

2. While the Circuit Court of Appeals for the Second Circuit, in *Loose-Wiles Biscuit Company* v. *Rasquin*, 95 F. (2d) 438, and the Circuit Court of Appeals for the Third Circuit in the cases at bar, have both construed the phrase "the first domestic processing" as meaning "the first domestic processing after the effective date of the tax," the Circuit Court of Appeals for the Third Circuit in its opinion

in the cases at bar expressly rejected the sole ground upon which the Circuit Court of Appeals for the Second Circuit arrived at that conclusion; and the Circuit Court of Appeals for the Second Circuit did not in its opinion adopt any of the grounds upon which the Circuit Court of Appeals for the Third Circuit later reached its conclusion, although those grounds were urged upon it by the Government.

3. The question of statutory construction here involved has been passed upon by United States courts in six cases. While they do not thus far present a situation in which a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter, they do present such a conflict of decisions among six different courts and such a conflict of reasoning between Circuit Courts of Appeal that the conflict should, we submit, be resolved by this Court. In three cases in District Courts in the Sixth and Seventh Circuits Section 602½(a) has been construed as petitioner contends. The most recent of those decisions was rendered after the first decision by the Circuit Court of Appeals in the instant case, the District Court expressly refusing to follow the Circuit Court of Appeals in the instant case. The decision for the taxpayer in that case is on appeal to the Circuit Court of Appeals for the Seventh Circuit, and is set for argument on April 20. In three of the six cases (including the instant case and the *Loose-Wiles* case *supra*) Section 602½(a) has been construed in accordance with the Government's contentions *but with dissents in the instant case and one other*, and in the *Loose-Wiles* case without any presentation to or consideration by the Court of the fact that the phrase "the first domestic processing" was carried over from the Agricultural Adjustment Act passed in the previous year by the same Congress (hereinafter called A. A. A.) or of the fact that it was construed in that act

by the Treasury Department prior to the enactment of Section 602½ as meaning the earliest domestic processing. Neither were there presented to or considered by the Court in the *Loose-Wiles* case the occasion and purpose of Section 602½ as evidenced by the debates or the reports of congressional committees thereon, or the fact that the context of the phrase "the first domestic processing" in an amendment of Section 602½ passed in 1936 is incompatible with any idea of ratification of the construction of that phrase in Regulations 48. These six cases, in chronological order, and the present status of each, are as follows:

(a) *Armour & Company of Delaware* v. *Carter H. Harrison, Collector of Internal Revenue,* not officially reported but reported in C. C. H. Fed. Tax Service, 1937, Vol. 4, Par. 9507, 19 A. F. T. R. 1347 (1937, U. S. District Court, Northern District of Illinois, Eastern Division, BARNES, J.). This was a suit to recover taxes levied under Section 602½ based, as to part of the tax sought to be recovered, on facts similar to those presented by the cases at bar. The Court construed Section 602½ as petitioner contends. Judgment was entered for plaintiff for $172,962.63 and interest. The Government appealed but upon stipulation between the parties the appeal was dismissed and the judgment was settled by payment of the judgment in full with some interest thereon. 95 F. (2d) 993.

(b) *Cincinnati Soap Company* v. *United States,* 22 F. Supp. 141 (1938, District Court, Southern District of Ohio, DRUFFEL, J.). The precise issue involved in the instant case was there raised by a demurrer interposed by the Government. The demurrer was overruled, Section 602½ being again construed as petitioner construes it. The Government elected to try out the issues of fact instead of asking a review on appeal of the question of law. The case is still awaiting trial on the merits in the District Court.

(c) *Loose-Wiles Biscuit Company* v. *Rasquin*, 95 F. (2d) 438 (1938, C. C. A. 2nd; Cert. Den. 305 U. S. 611). Section 602½ was construed as the Court below has construed it, the decision resting upon a holding that the 1936 amendment of Section 602½ constituted Congressional approval of the Regulations. The taxpayer in that case failed to call to the attention of the Court the facts with respect to the 1936 amendment which preclude any such deduction therefrom (*infra*, pp. 21, 25-27) and the Court itself did not analyze the amendment but merely noted that it repeated the phrase "the first domestic processing." This is also the case mentioned above in which the legislative history of Section 602½ was not presented to the Court. (For that history see *infra*, pp. 16 to 21.)

(d) *Tasty Baking Company* v. *United States*, 38 F. Supp. 844 (Ct. Cl. 1941), Cert. Den. 314 U. S. 654. By a divided court Section 602½ was construed as the Court below has construed it. Judge LITTLETON dissented. The majority opinion by JONES, J. rested chiefly on the *Loose-Wiles* case, *supra*, and on the denial by this Court of a writ of certiorari in that case which was stressed in the opinion. Again there was no discussion in the opinion of the legislative history of the act and no analysis of the 1936 amendment.

(e) *Durkee Famous Foods* v. *Harrison*, 46 F. Supp. 642, 651 (District Court, Northern District of Illinois, Eastern Division, 1942, SULLIVAN, J.). Section 602½ was construed as petitioner construes it. The Court did not follow the decision in the *Loose-Wiles* case, *supra, and expressly refused to follow the original decision of the Circuit Court of Appeals in the case at bar,* though both of those decisions were before that Court. The Court held that it was not "a reasonable interpretation of Section 602½ to construe the language there used as meaning 'first after the effective date

of the act' " in view of the derivation of the language of Section 602½ from the Agricultural Adjustment Act, the administrative interpretation of "first domestic processing" as used in that Act, "the apparent adoption by Congress of that interpretation by defining the taxing phrase in Section 602½ to mean 'the first use in the United States' without adding the further phrase 'after the effective date of the Act', which phrase was supplied by the Commissioner in the Regulation." The Court stated its belief that "it is clear that Congress intended to and did levy the tax under Section 602½ upon the first use of the imported oils after they reached the United States, with no thought of taxing any subsequent or later use thereof." An appeal by the Government is now pending in the Circuit Court of Appeals for the Seventh Circuit and, as noted, is set for argument on April 20.

(f) *Colgate-Palmolive-Peet Company* v. *United States* (the instant cases). Decided against the petitioner March 31, 1942 by a unanimous court. Reargued and again decided against the petitioner on August 21, 1942 by a divided court. Judge MARIS, who had concurred in the original decision, wrote a dissenting opinion in which he accepted petitioner's construction of the statute and expressed agreement with Judge SULLIVAN's decision in the *Durkee Famous Foods* case.

4. The wavering of the Circuit Court of Appeals for the Third Circuit, disclosed by successive changes in its opinion, and obvious errors in its opinion, are such as to indicate that the question here presented should be decided by this Court.

(a) The Court held that the doctrine of the prospective operation of a statute points to the word "first" as meaning "first after the effective date of the tax." This is erroneous because, *inter alia*, either

construction of the word "first" gives to the statute a wholly prospective operation.

(b) The Court held that Treasury Regulations 48 were made applicable to Section 602½ of the Revenue Act of 1934 by Section 602½(f) of that act. That cannot be true because Treasury Regulations 48 were not issued until more than three months after the enactment of Section 602½(f).

(c) The original opinion stated that since the promulgation of the Regulations Congress "amended" Section 602½ without any indication of disapproval of the Regulations, in that by Section 402 of the Revenue Act of 1935 Congress imposed a compensatory tax upon the importation of articles produced from the oils named in Section 602½. In connection with this statement the Court twice changed its opinion. The Court in its second (majority) opinion upon rehearing said that it had been in error in stating that Section 402 was such an amendment but said that Congress dealt therein "with a subject matter closely allied to that contained in Section 602½ and in doing so indicated no disapproval of the interpretation put upon that section by the Treasury Department," but the Court expressed the opinion "that these facts furnish some evidence that Congress *was not dissatisfied* with the Treasury Department's interpretation." In an order entered November 11, 1942 denying a petition for a second rehearing the Court ordered that there be deleted from its prior (majority) opinion the statement "that these facts furnish some evidence that Congress was not dissatisfied with the Treasury Department's interpretation."

(d) The original opinion states that study of the 1936 amendment to Section 602½ leads to the conclusion that Congress intended to tax the oils or combinations designated in Section 602½ and not previously taxed under that section, whether processed prior to the passage of the 1934 Act or not. This apparently rests on the description of that amendment and of the changes made in it in Conference Committee which immediately precedes the above statement in the opinion. That description is wrong and omits the most significant feature of the changes made by the Conference Committee (Brief, pp. 25-27, *infra*).

(e) In its original opinion the Court expressly rejected the contention of the Government that the amendment of 1936 to Section 602½(a) constituted approval by Congress of Regulations 48. Again the Court twice changed its opinion. In its second (majority) opinion the Court stated that it had been in error in this ruling and that the Circuit Court of Appeals for the Second Circuit had been right in holding in the *Loose-Wiles Biscuit Company* case that the amendment did constitute approval—the sole ground of the decision in that case. However, in its order denying our petition for a second rehearing the Court below retracted its endorsement of this contention, thus returning to its original position that the amendment did not constitute approval of the Regulations.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to

certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings in the Circuit Court of Appeals had in these cases, to the end that these cases may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may seem proper.

Respectfully submitted,

E. Ennalls Berl,
Attorney for Petitioner,
Delaware Trust Building,
Wilmington, Delaware.

Albert C. Wall,
Mason Trowbridge,
Blevins C. Dunklin,
Edward J. O'Mara,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Grounds for Allowance of Writ.

The discussion below in Part III of this brief establishes, we submit, that the Court below has decided a federal question, viz., the meaning of Section 602½, in a way which is in conflict with decisions of this Court. Purporting to apply the rule of prospective operation of statutes the Court below has in fact applied a wholly novel doctrine that when Congress refers to "the first domestic processing" it must be taken to mean the first domestic processing in the future.

There is such a conflict of decisions, we respectfully submit, as to present a proper case for the settlement of those conflicts by this Court. While the decisions in conflict with that in the instant case are thus far those of District Courts they are three in number and the decision of Judge SULLIVAN in the *Durkee Famous Foods* case was rendered after the original decision in the instant case which he expressly refused to follow. And in his dissenting opinion in the case at bar Judge MARIS concurred in the views of Judge SULLIVAN.

II.

Petitioner's Case.

The following constitutes petitioner's case:

1. When Congress set up the system of farm benefits under the A. A. A. in 1933 it was necessary to raise revenue to finance them. Accordingly the A. A. A. provided for a revenue tax on the domestic processing of certain agricultural commodities and under the caption "Supplementary Revenue Provisions" provided further in Section 16(a) for a floor stock tax on such of those commodities already processed and their products as might be on hand when the processing tax went into effect.

2. Most of those commodities, like the foreign oils involved in this case, were commonly subjected in the ordinary course to successive domestic processings. It was necessary with them, as later with those foreign oils, to designate which domestic processing was to be taxed. Congress designated in the A. A. A. "the first domestic processing" (Appendix p. 29).

3. That meant, everyone agrees, the earliest domestic processing. *Regulations 81 issued under the A. A. A. so construed the phrase.* The Regulations specifically recognized that "the first domestic processing" might be completed before the effective date of the tax and that the processing tax would not in that case attach to the particular quantity of the commodity (Appendix p. 34). The Court below recognized that (Rec. p. 42).

4. The inclusion in the commodities subject to this A. A. A. tax of domestic products which had to compete with foreign vegetable oils immediately put those domestic products at a disadvantage. So the same 73rd Congress which

in 1933 enacted the A. A. A., in 1934 enacted Section 602½ as a remedy. That was the reason for Section 602½. (Appendix p. 35 *et seq.*) The remedy was the imposition upon the foreign oils also of a similar tax on "the first domestic processing".

5. Congress selected that remedy instead of the usual duty because Congress was precluded by the Philippine Independence Act from levying a duty on coconut oil from the Philippine Islands except on importations in excess of 200,000 long tons a year.[1] So Congress levied a processing tax in order to effect the protection which otherwise would have been effected by a duty. The Court below recognized that (Rec. p. 44).

6. Five of the seven subsections of Section 602½ were taken almost in their entirety and practically verbatim from the A. A. A., including the language levying a tax on "the first domestic processing." (See parallel column comparison, Appendix pp. 29-33.)

7. Congress did not indicate that it used the phrase "the first domestic processing" in 1934 in any different sense than in 1933 in the Act from which it was transplanted. This in spite of the fact that it was careful in Section 602½ to define the phrase. It defined it to mean "the first use in the United States"—*of these foreign oils*—"in the manufacture of an article intended for sale". This was an incorporation into Section 602½ of the administrative interpretation already given to the phrase.

---

[1] There is no dispute as to that. In the Senate the debates centered around the tax on coconut oil and whether such tax constituted a moral if not a technical legal violation of the Philippine Independence Act which specifically permitted the importation without duty of 200,000 long tons of Philippine coconut oil each year. (Cong. Rec. Vol. 78, pp. 6308-6324.)

8. The tax so levied upon "*the first use in the United States*" etc. of these foreign oils was a substitute for a duty. They could not be taxed when they entered the country, so they were taxed at the first available point within the country.

9. A duty would not have reached the oils involved in this suit which were already within the country on the date when the 1934 Revenue Act became effective. But Section 602½ is made to reach them by an interpolation by the Treasury Department of the words "on and after the effective date of the tax."

10. Construed according to the normal meaning of its language Section 602½ has as nearly the same effect that a duty would have as the different natures of the two taxes permit. The construction put upon the section by the Government gives it a much wider scope in that it is made thereby to apply to oils already in this country and already domestically processed.

11. The Congressional debates show that *the specific purpose of Section 602½ was to restrict future imports* (Appendix pp. 35-39). Nowhere in the Congressional debates and committee reports is there any reference to oils which might be on hand when the tax went into effect.

12. Congress has been passing acts for the protection of American products for more than a century and has never in that connection concerned itself with anything but future imports. It has never concerned itself with foreign products already in this country.

13. The purpose of Section 602½ is protection. No protection was afforded American farmers by so construing the section as to tax foreign oils already domestically processed and in course of conversion into finished products.

The taxation of those oils, which were already in the hands of manufacturers on the effective date of the tax, could not bring about a substitution of domestic oils for such foreign oils and, since they were not held for sale, could not affect the domestic price level.

14. House Report No. 704 which accompanied the introduction of the Revenue Bill of 1934 stated with respect to Section 602 (later renumbered 602½), *inter alia*: "To prevent avoidance of the tax by the performance of preliminary processing *outside of the United States*, the tax is likewise imposed upon *the first processing in the United States* of mixtures or combinations in chief value of coconut or seasame oil [the only oils originally included in the section] or of both oils"—a clear indication that "first" is used with relation to the entry of the oils into this country, *i. e.*, the earliest use in the United States (Appendix p. 39).

15. Similarly, House Conference Report No. 1385 explains parenthetically that "first domestic processing" is "defined as *the first use in commercial manufacture or production*" (Appendix p. 39).

16. Section 602½ (then Section 602) as it went to conference included in the taxable oils imported whale oil, imported fish oil and imported marine-animal oil. The Conference Committee shifted these oils to an import tax section, which was not precluded by the Philippine Independence Act, leaving the vegetable oils in the processing tax section, and the bill passed in that form. The House Conference Committee in its Report No. 1385 summarized the effect of that shift. The report stated that the amendment "changes the point of imposition of the tax in the case of imported whale oil, imported fish oil and imported marine-

animal oil to the importation instead of the first domestic processing" (Appendix p. 40).

17. If "the first domestic processing" had meant "the first after the effective date of the tax" an important effect of shifting these oils would have been to relieve all these oils already in the country and already domestically processed from taxation, to which under the processing tax *so construed* they would have been subject had the shift not been made; and surely House Conference Report No. 1385 would have mentioned so important an effect. If on the other hand, "first" means "earliest," a shift would have produced no such effect. The report mentions no such effect, presumably because the intended meaning of "first" was not such as to produce that effect but was its normal meaning of "earliest".

18. The House Ways and Means Committee was urged to supplement the processing tax in Section 602½ with a floor stock tax, as had been done in A. A. A. Such a tax would have reached the oils involved in this suit and all other domestically processed oils on hand in the United States on the effective date of the section. But the Committee declined to follow this course. No floor tax was enacted (Committee on Ways and Means Hearings, Revenue Revisions 1934, p. 600).

19. That was the picture on the day when Section 602½ was enacted. Those were the facts available to the Commissioner of Internal Revenue when he came to issue his regulations on August 17, 1934.

20. Nevertheless, on August 17, 1934, the Treasury Department issued the Treasury Regulation under review, this time construing "the first domestic processing" as meaning "the first after the effective date of the tax."

21. In 1936 Congress amended Section 602½. Among the changes effected by the amendment was the introduction of two clauses exempting, respectively, certain fatty acids and salts (Clause 1) and certain mixtures and combinations (Clause 2). The exemption in Clause 1 was conditioned on "a previous first domestic processing *taxed under this section*" while the exemption in Clause 2 was merely conditioned on "a previous first domestic processing". If "first" meant "first after the effective date of the tax" then every first domestic processing would necessarily be a taxed processing. There would be no assignable reason for the different language of the two clauses. But if "first" be given its normal meaning of "earliest" then there would be first domestic processings which would be taxable (those occurring after the effective date of the tax) and first domestic processings which would not be taxable (those occurring before the effective date of the tax) and the different language of the two clauses becomes explicable. The inclusion in Clause 2, relating to mixtures and combinations, of the words "taxed under this section" would have changed the basis established in the original act for the taxation of mixtures and combinations, which may have been a reason for not doing it. The inclusion of that phrase in Clause 1, relating to fatty acids and salts, changed nothing because prior to the 1936 amendment fatty acids and salts were not taxed (Appendix p. 41).

III.

The Opinions in the Circuit Court of Appeals.

The majority of the Court below recognized that the phrase "the first domestic processing" was derived from Section 9(a) of the A. A. A. and that the Treasury Department construed the phrase as there used to mean "the first

in point of time." But the Court held that it did not follow that the same interpretation should be put upon that phrase as used in Section 602½ because Section 9(a) of the A. A. A, and Section 602½ "cannot be deemed to be *in pari materia*" (Rec. p. 43). How any two statutory provisions could be more truly *in pari materia* we are unable to see. (See parallel column comparison, Appendix pp. 29-33). In any case "first" means "earliest", and not first after some date of reference unless some date of reference is indicated. This meaning is not affected by the presence or absence of a supplementary floor stock tax even though such a tax, if provided for, might give further evidence that the word "first" was used in the sense of "earliest".

The Court below recognized that the processing tax levied by Section 602½ was "substituted for an impost", *i. e.*, a duty (Rec. p. 44). It said, however, that it could "see no reason why Congress should not have desired to protect domestic fats against competitive imported oils whether prior to the passage of the act these had been processed within the United States or not." The speculation that Congress might have desired to do that ignores the fact that the debates in Congress show that what Congress was driving at was the restriction of future imports, which is all Congress has ever aimed at in a century of protective legislation (Appendix pp. 35-39), and it ignores the fact that taxation of processed oils already in course of conversion into finished products could not possibly afford any protection.

So on those grounds the Court rejected the normal inferences from the history of Section 602½. It also declined to give the word "first" its literal meaning, though recognizing that "If we take the literal meaning of the word 'first', we must concede that it means in advance of all others, the earliest" (Rec. p. 45). But the Court found: "Two plain sign posts remain to guide us."

First "Plain Sign Post".

The first "plain sign post" is this:

> "First, * * * a statute is presumed to operate on future acts unless a contrary intent is declared. * * * In our opinion the doctrine of the prospective operation of a statute has become so much a part of our law as to require Congress to employ plain words to overcome the presumption that a statute will so operate" (Rec. p. 45).

Implicit in this statement is the view that the statute as construed by petitioner does not operate prospectively and that therefore the statute cannot be so construed in the absence of plain words indicating that Congress intended it to be so construed. Nothing could be farther from the fact. Section 602½ operates prospectively and not retroactively however it be construed. The whole basis of petitioner's case is that the tax is levied upon "the first domestic processing" only when "the first domestic processing" occurs after the effective date of the tax. The taxing language in A. A. A. was construed by the Treasury Department as petitioner construes the same language in Section 602½ and no violence was done thereby to the principle of prospective operation of statutes. No violence is done to that principle by a similar construction of Section 602½.

The principle cannot be invoked to enlarge or add to the statutory definition nor to write into the statute words not put there by Congress.

Whereas this Court has uniformly applied the rule to protect taxpayers from a retroactive application of a tax, the Court below uses the rule as a means of levying a tax.

The rule does not require that second, third, fourth and fifth processings be taken as first processings for the purposes of Section 602½.

Second "Plain Sign Post".

The second "plain sign post" seems to consist of two indicators, of which the first reads (Rec. p. 45):

> "Second, Treasury Regulations 48 * * * construe the phrase 'first domestic processing' as meaning the first use in the United States after the effective date of the Act. The defendant [the Government] points out that these regulations were promulgated by the Treasury Department pursuant to the provisions of Section 1101 of the Revenue Act of 1926. See 44 Stat. 111. Sec. 602½(f) of the Revenue Act of 1934, 48 Stat. 764, provides that all provisions of Section 600 of the Revenue Act of 1926, 44 Stat. 93, not inconsistent with the provisions of Sec. 602½ of the Revenue Act of 1934 shall be applicable in respect to the taxes imposed by Section 602½. In effect, therefore, contends the defendant, Treasury Regulations 48 were made applicable to Section 602½ of the Revenue Act of 1934."

Petitioner takes this recital of defendant's contention as an endorsement of that contention as there does not seem to be any other reason for stating it and the caption indicates that this is part of the "Second" sign post. Regulations 48 were promulgated August 17, 1934—three months *after* the enactment of the 1934 Act and relate exclusively to Section 602½. Those Regulations could not have been made applicable by that Act; they were not in existence at the time it was passed.

The other indicator on the second "plain sign post" was this:

> "Since the promulgation of the regulations referred to Congress on one occasion *amended* Section 602½ without any indication of disapproval of the interpretation of the Treasury Department as to the prospective operation of the statute. By Section 402 of the Revenue Act of 1935, 49 Stat. 1026, Congress imposed a compensatory tax upon the impor-

> tation of articles produced from the oils named in Section 602½" (Rec. pp. 45, 46).

The fact being that Section 402 of the Revenue Act of 1935 was neither an amendment nor a reenactment of Section 602½, the Court stated in its second opinion:

> "Obviously, the word 'amended' was used erroneously [*i.e.* in its original opinion]. Congress did not amend Section 602½, but it dealt with a subject matter closely allied to that contained in Section 602½ and in doing so indicated no disapproval of the interpretation put upon that section by the Treasury Department in Regulations 48. We think that these facts furnish some evidence that Congress was not dissatisfied with the Treasury Department's interpretation providing prospective operation for Section 602½." (Rec. p. 53.)

By order entered November 11, 1942, the Court ordered that there be stricken from its second opinion the sentence: "We think that these facts furnish some evidence that Congress was not dissatisfied with the Treasury Department's interpretation providing prospective operation for Section 602½."

The Court states in the final paragraph of its original opinion but not as a "sign post" that "study of the 1936 amendment" to Section 602½ leads to the conclusion that Congress intended to tax the oils or combinations designated in Section 602½ and "not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not" (Rec. p. 47). That conclusion appears to rest on a description, in the preceding paragraph of the Court's opinion, of the changes made in Conference Committee in the 1936 amendment, which description is wholly wrong and omits the significant feature of those changes. The amendment in the form in which it reached the Conference Committee imposed the tax on the designated oils and upon their fatty acids and salts (fatty acids and salts being newly

added to the taxable articles); and like the original Section 602½ the amendment likewise levied the tax on combinations and mixtures where "there has been no previous first domestic processing" of the taxable ingredient. The Court states in its opinion that "the bill was re-written in committee and the words 'taxed under this section' was added to the phrase '*no* previous domestic processing'." That is not correct. The phrase "*no* previous first domestic processing" is not to be found in the amendment as reported out by the conference committee and finally passed, nor was there a mere addition to existing language of the phrase "taxed under this section." What the committee did was to take out the phrase "no previous first domestic processing" and to introduce for the first time into Section 602½ two exemption clauses (Appendix p. 42). One related to combinations and mixtures and the exemption was conditioned on "a previous first domestic processing" of the contained taxable ingredient. This in effect, though not in form because the exemption form was new, continued the same basis of taxation of mixtures and combinations as had been established in the 1934 Revenue Act. But with respect to fatty acids and salts, newly added to the taxable articles, the exemption was conditioned on "a previous first domestic processing *taxed under this section.*" That is, the tax did not apply to a "fatty acid or salt *resulting from* a previous first domestic processing taxed under this section."[1]

[1] Fatty acids "result from" the "splitting" of an oil into a fatty acid and glycerine. A salt of a fatty acid, such as soap, usually "results from" the simultaneous splitting of an oil and saponification with a caustic of the fatty acid produced by the splitting. Such a domestic splitting of an oil or simultaneous splitting and saponification might have occurred before May 10, 1934, in which event the splitting, "resulting" in a fatty acid, or the simultaneous splitting and saponification, "resulting" in a salt, *i. e.*, soap, would not have been taxed. Or such a domestic splitting of an oil or simultaneous splitting and saponification might have occurred after May 10, 1934, in which event the splitting, "resulting" in a fatty acid, or the simultaneous splitting and saponification, "resulting" in a salt, would have been taxed.

This ruling of the Court fails to give any effect whatsoever to the fact of the two separate exemption clauses with a clear-cut distinction between the two exemptions. This distinction in the two exemption clauses gives meaning and purpose to the creation of the two exemption clauses. If Congress did not intend some differentiation between the two clauses, why the limiting phrase—"taxed under this section"—in the one and not in the other? If this limitation was intended to apply indiscriminately to both exemption clauses, why did Congress deliberately create two exemption clauses, one with and one without the limitation? This limitation may not be read out of the first exemption clause. The amendment must be construed as enacted—without deletion.

The phrase "taxed under this section" cannot be brushed aside as mere surplusage. Some effect must be given to it. But it has no effect and there is no conceivable reason for its insertion if "the first domestic processing" means "the first domestic processing after the effective date of the Act." For then every "first domestic processing" would be taxable; there could be no such thing as an untaxed "first domestic processing." If, however, "first" be taken in its ordinary sense of "earliest" there would be first domestic processings which were taxed viz., those occurring after May 10, 1934, and first domestic processings which were untaxed, viz., those occurring before May 10, 1934. There would be a reason for use of the phrase "taxed under this section."

There is nothing in the Conference Committee Report on the amendment to substantiate the Court's view, as that report simply sets out *in haec verba* the text of the amendment as revised by the Committee (House Conf. Rep. #3068). Nor is there anything in the debates to substantiate the Court's view, the amendment as revised by the Conferees being adopted by the House and Senate without comment.

IV.

The Rule of Doubt.

Judge MARIS concluded his dissenting opinion in the Court below (Rec. p. 56):

> "Consequently I think that the regulation is invalid and that its application violates the settled rule, to which, however, the courts too frequently pay only lip service, that ambiguities in a revenue statute must be construed strictly against the Government and that doubts therein must be resolved in favor of the taxpayer."

Respectfully submitted,

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APPENDIX.

Derivation of Language Used in Section 602½.

We quote below in parallel columns corresponding provisions of the A. A. A., approved May 12, 1933 and Section 602½ approved May 10, 1934:

AGRICULTURAL ADJUSTMENT ACT	SECTION 602½
"Sec. 9. • • • The processing tax shall be levied, assessed, and collected upon *the first domestic processing* of the commodity whether of domestic production or imported, and shall be *paid by the processor.* • • •"	"(a) There is hereby imposed upon *the first domestic processing* of coconut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be *paid by the processor.* • • •"
"Sec. 15 (e) During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or in chief value from such commodity and imported into the United States or any possession thereof to which this title applies from any foreign coun-	[Section 602½ did not contain any provision for a compensating tax upon imports similar to the compensating tax of Section 15(e) printed opposite this paragraph. However, the idea for holding the tax upon Philippine coconut oil in a separate fund and paying the same over to the Philippine Islands undoubtedly came from the underscored portion of Section

try or from any possession of the United States to which this title does not apply, a *compensating tax* equal to the amount of the processing tax in effect with respect to domestic processing at the time of importation: *Provided, That all taxes collected under this subsection upon articles coming from the possessions of the United States to which this title does not apply shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund and paid into the Treasury of the said possessions, respectively* • • •."

(Sec. 19(b) of the A. A. A. (*infra*, p. 33) by reference incorporates in A. A. A. the provisions of Sec. 626 of the Revenue Act of 1932, subdivisions (a) and (b) of which read as follows.)

"(a) Every person liable for any tax imposed by this title other than taxes on importation (except tax under section 615, relating to tax on soft drinks) shall make monthly returns under oath in duplicate and pay the taxes imposed by this title to the collector for the district

15(e) of the A. A. A. as shown from the comparison below.)

"(a) • • • All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands • • •."

"(b) Each processor required to pay the tax imposed by this section shall make monthly returns under oath in duplicate and pay the tax to the collector of internal revenue for the district in which is located his principal place of business, or if he has no principal place of business

in which is located his principal place of business or, if he has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

"(b) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid."

"Sec. 17. (a) Upon the exportation to any foreign country (including the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam) of any product with respect to which a tax has been paid under this title, or of any product processed wholly or in chief value from a commodity with respect to which a tax has been paid under

in the United States, then to the collector of internal revenue at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum per month from the time the tax became due until paid."

"(d) Upon the exportation to any foreign country or to a possession of the United States of any article wholly or in chief value of an article with respect to the processing of which a tax has been paid under this section, the exporter thereof shall be entitled to a refund of the amount of such tax. Upon the giving of bond satisfactory to the Secretary for

this title, the exporter thereof shall be entitled at the time of exportation to a refund of the amount of such tax.

"(b) Upon the giving of bond satisfactory to the Secretary of the Treasury for the faithful observance of the provisions of this title requiring the payment of taxes, any person shall be entitled, without payment of the tax, to process for such exportation any commodity with respect to which a tax is imposed by this title, or to hold for such exportation any article processed wholly or in chief value therefrom."

"Sec. 18. (a) If (1) any processor, jobber or wholesaler has, prior to the date a tax with respect to any commodity is first imposed under this title, made a bona fide contract of sale for delivery on or after such date, of any article processed wholly or in chief value from such commodity, and if (2) such contract does not permit the addition to the amount to be paid thereunder of the whole of such tax, then (unless the faithful observance of the provisions of this section requiring the payment of taxes, any person shall be entitled, without payment of the tax to process for such exportation any article with respect to which a tax is imposed by this section."

"(e) If (1) any person has, prior to January 26, 1934, made a bona fide contract for the sale on or after the effective date of this section of any article wholly or in chief value of an article with respect to which a tax is imposed by this section or of any article with respect to which a tax is imposed by this subsection, and if (2) such contract does not permit the addition to the amount to be paid thereunder

contract prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price.

"(b) Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated and shall be collected and paid to the United States by the vendor in the same manner as other taxes under this title. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner of Internal Revenue who shall cause collections of such taxes to be made from the vendee."

"Sec. 19. * * * (b) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, insofar as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: * * *"

of the whole of such tax, then (unless the contract expressly prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price. Taxes payable by the vendee shall be paid to the vendor at the time the sale is consumated and shall be returned and paid to the United States by the vendor in the same manner as other taxes under this section. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner, who shall cause collection of such taxes to be made from the vendee."

"(f) All provisions of law (including penalties) applicable in respect of taxes imposed by section 600 of the Revenue Act of 1926, shall, insofar as applicable and not inconsistent with this section, be applicable in respect of the taxes imposed by this section."

Appendix

Article 7 of Treasury Regulations 81 Issued Under the A. A. A.

"Art. 7. When tax attaches.—The tax attaches upon the first domestic processing of the commodity. Where some part of the first domestic processing of a particular quantity of the commodity takes place during the period when the tax is effective, the tax attaches notwithstanding that some portion of the first domestic processing of such quantity takes place before or after such period." (As originally promulgated July 12, 1933.)

"Art. 7. When tax attaches.—The tax attaches *at the beginning* of the first domestic processing of the commodity. When the first domestic processing *begins before the effective date, no tax attaches,* although it is not completed until after the effective date. When the first domestic processing begins while the tax is in effect, it is subject to the processing tax, notwithstanding it is not completed until after the tax is terminated." (As amended September 20, 1933.)

"Art. 7. When tax attaches.—The tax is imposed upon *the first domestic processing,* and is measured by the amount of the commodity put into such processing. The tax attaches to a particular quantity of the commodity (1) *if it is in process on the effective date, provided the first domestic processing has not been completed prior to that date,* or (2) if the first domestic processing is begun during the period while the tax is in effect, provided it is completed before the termination of the tax. Where the first domestic processing of a particular quantity of the commodity is completed prior to the effective date, but on the effective date such quantity is in secondary processing, it is subject to the tax on floor stocks (see Regulations 82)." (As amended November 2, 1933 retroactively to July 9, 1933.)

Appendix

Extracts From the Congressional Debates Showing That Both Those Who Favored and Those Who Opposed Section 602½ All Recognized That Its Specific Purpose Was to Restrict Future Importations.

"On account of the unusual conditions existing it was thought by a good many that as we were placing a processing tax on domestic commodities and limiting the production of our farmers that we might put some *restriction on the commodities from abroad* that compete with our American commodities." (Chairman Doughton of the House Ways and Means Committee—Cong. Rec. Vol. 78, p. 2513.)

"How can this be done (i. e. how can prices be raised) as to dairy products, meat products, animal fats and cottonseed and other vegetable oils, *if imported oils are permitted to flood our markets* duty-and-tax-free and sold at 2½ cents per pound at the American seaboard? * * * Fat hogs and fat cattle are dirt cheap because *foreign oils have displaced our lard and fats* in our home markets." (Congressman Shallenberger—Cong. Rec. Vol. 78, p. 2529.)

"The large users of vegetable oils naturally oppose this tax *because it will tend to force them to the use of American-produced fats and oils.*" (Congressman Knutson—Cong. Rec. Vol. 78, p. 2614.)

"Imported coconut and sesame oils compete directly and indirectly with domestic fats and oils. This competition occurs chiefly with cottonseed oil, lard, tallow, and butter. *Under the Agricultural Adjustment Act, Congress has attempted to restore agricultural prices to pre-war parity: but this legislation fails to take care of the competition of these foreign oils with domestic oils and fats.* While domestic production is being restricted, imported oils and fats are coming into this country in increasing quantities. * * *" (Congressman Treadway—Cong. Rec, Vol. 78, p. 2658.)

"The amount of this tax is equivalent to 200 percent on the current market price of coconut oil. No industry could bear that tax and survive and it is very clear from their statements before the House, that the proponents of this tax are not expecting revenue but are seeking only to prevent the importation of coconut oil. • • •

"Many members of this House have taken advantage of this debate to express themselves more or less vehemently *in favor of the total exclusion of coconut oil and are in favor of this tax as a means to that end.*" (Congresswoman Kahn—Cong. Rec. Vol. 78, p. 2785.)

"As every member knows, practically the entire amount of copra and coconut oil used in Continental United States comes from the Philippine Islands and the imposition of this so-called 'excise tax' is nothing more or less than the imposition of a *prohibitive tariff* on a people under the American flag." (Congressman Welch—Cong. Rec. Vol. 78, p. 2793.)

"I have been approached by people from my own state who were over here by the dozens saying they wanted this tax imposed *in order to keep Filipino products out of this country.* That is all that is behind it. There is not an ounce of revenue in it." (Senator Tydings—Cong. Rec. Vol. 78, p. 6312.)

"• • • we are only treating the Filipinos as we are treating our own people *when we put similiar taxes* on their products." (Senator Reed—Cong. Rec. Vol. 78, p. 6312.)

"I am sure there are a good many Senators here who want to abide by the independence act, but, at the same time, *they desire to put a fair limitation on imports.*" (Senator Harrison—Cong. Rec. Vol. 78, p. 6314.)

"Mr. President, if there is a processing tax upon hogs, why cannot a competitive tax be levied upon coconut oil if

such oil comes in competition with our product?" (Senator Byrnes—Cong. Rec. Vol. 78, p. 6314.)

"What good does it do to reduce our own production of oil if we are going to permit the Philippines or the Africans or the people in Borneo or Java or the other islands of the seas simply to fill up the gap we are trying to create by their shipping us some more of their oil that does not require any labor to produce." (Senator Connally—Cong. Rec. Vol. 78, p. 6316.)

"I believe some of this oil will be excluded, because the Senator knows that whenever we put a duty on any article there is a certain deterrent effect, and *to some extent it will lessen imports.*" (Senator Connally—Cong. Rec. Vol. 78, p. 6316.)

"The processing tax which was inserted in the bill by the House provided for a tax of 5 cents a pound upon coconut oil and copra. Its effect, if unmodified, would be *the same as though we had levied a tariff tax.*" (Senator Norris—Cong. Rec. Vol. 78, p. 6380.)

Senator Reed of the Senate Finance Committee said:

"We could extend the A. A. A. by an amendment to cover the Philippines."

to which Senator Borah replied:

"*That is really what we are doing in this bill.*" (Cong. Rec. Vol. 78, p. 6381.)

"This tax is intended on its face to be a prohibitive tax. It is not included in this bill for the purpose of raising revenue. *It is for the purpose of establishing an embargo.*" (Senator Clark—Cong. Rec. Vol. 78, p. 6393.)

"I make the motion because, to my mind, the inclusion in a so-called 'revenue bill' of provisions which are not intended

to raise revenue, *but contemplate an embargo*, is a most dishonest and most vicious system of legislating." (Senator Clark—Cong. Rec. Vol. 78, p. 6395.)

"Thus the tax is no different in effect from the several processing taxes levied by the A. A. A. upon basic farm commodities. The tax is not laid at the custom house but upon the first domestic processor." (Congressman Reed—Cong. Rec. Vol. 78, p. 7246.)

"The purpose of this action is to exclude Filipino products, not to raise revenue.

"• • • Even so, if this were a revenue tax, we might justify it on some vague ground, but this is a tariff tax and nothing else, *put on to exclude an article which we do not produce in the United States."* (Senator Tydings—Cong. Rec. Vol. 78, p. 7976.)

Congressman Hill of Washington was the Chairman of the Ways and Means Subcommittee which drafted the Revenue Bill of 1934 and he presented the Conference Report to the House for its action. In the course of such presentation, he was asked by Congressman McDuffie (Alabama) (Cong. Rec. Vol. 78, p. 7833):

"Does the gentleman not believe that under the 3-cent tax or the 5-cent tax there will be very little money paid into the Treasury as the result of this law?"

Mr. Hill:

"That is probably true. That is the hope of the dairymen, I will say."

The foregoing quotations not only show that Section 602½ was intended specifically to restrict future imports but also that it was enacted because of the taxes provided for in the A. A. A. and that it was not a revenue measure.

Messrs. Doughton, Shallenberger, Knutson, Treadway, Hill, Harrison, Byrnes, Connally, Norris, Sen. Reed and Cong. Reed were for the bill. Messrs. Kahn, Welch, Tydings and Clark were against the bill.

Extract From House Report No. 704 Submitted by the House Ways and Means Committee Explaining Section 602½ (At that Time Sec. 602).

"Section 602.—Tax on coconut and sesame oils: This section imposes a processing tax on coconut oil and sesame oil. 'Processing' is defined as the first use of the oil in the manufacture or production of an article for sale. The tax applies to processing in the United States including the territories, but not the possessions. To prevent avoidance of the tax by the performance of *preliminary processing outside of the United States*, the tax is likewise imposed upon *the first processing in the United States* of mixtures or combinations in chief value of coconut or sesame oil or of both oils."

House Conference Report No. 1385 Explaining the Changes Made by the Conferees in Section 602½.

"Amendment No. 153: The House bill imposed a tax of 5 cents per pound on the first domestic processing (*defined as the first use in commercial manufacture or production*) of coconut oil, sesame oil, or combinations or mixtures brought into the United States in chief value of either or both such oils.

"This amendment reduces the rate of tax to 3 cents per pound. It also adds palm oil, palm kernel oil, sunflower oil, perilla oil, imported whale oil, imported fish oil (except cod and cod-liver oil), and imported marine-animal oil to the

taxable oils and taxes combinations of the oils enumerated in the section and mixtures containing substantial quantities of any one or more of such oils. Palm oil used in the manufacture of tin plate is exempted from the tax. All taxes collected under the subsection on products of the Philippines are to be held as a separate fund and paid into the treasury of the Philippines, but this provision is to be inoperative if the Philippine Government by any law provides for any subsidy to be paid to producers of copra, coconut oil or allied products.

"The House recedes with an amendment which (1) taxes the oils enumerated in the Senate amendment, except sperm oil, perilla oil, and halibut liver oil; (2) taxes combinations or mixtures containing substantial quantities of taxable oils with respect to which there has been no previous first domestic processing; (3) retains the rate of 3 cents per pound on all articles taxable, except that an additional tax of 2 cents (making a total of 5 cents) per pound is imposed on coconut oil (and combinations or mixtures containing substantial quantities of coconut oil) unless the oil is the product of the Philippines or other possessions or produced from materials from the Philippines or other possessions, or was in the United States on or before the same day, or was contracted for, or produced from materials contracted for, before April 26, 1934; (4) *changes the point of imposition of the tax* in the case of imported whale oil, imported fish oil, and imported marine-animal oil to the *importation* instead of *the first domestic processing;* and (5) provides for payment to the Philippine treasury of taxes collected on coconut oil, and mixtures containing coconut oil of Philippine origin or produced from Philippine materials."

Appendix

Section 602½ as Amended by Section 702 of the Revenue Act of 1936.

"Sec. 702. Processing Tax on Certain Oils.

"(a) The first sentence of section 602½ of the Revenue Act of 1934 is amended to read as follows:

'(a) There is hereby imposed upon the first domestic processing of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts, a tax of 3 cents per pound to be paid by the processor, but the tax under this section shall not apply *(1)* with respect to any fatty acid or salt resulting from *a previous first domestic processing taxed under this section* or upon which an import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, or *(2)* with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been *a previous first domestic processing* or upon which an import tax has been paid under such section 601(c)(8).'

"(b) Notwithstanding the provisions of subsection (a) of this section, the first domestic processing of sunflower oil or sesame oil (or any combination or mixture containing a substantial quantity of sunflower oil or sesame oil), if such oil or such combination or mixture or such oil contained therein was imported prior to the effective date of this title, shall be taxed in accordance with the provisions of section 602½ of the Revenue Act of 1934 in force on the date of the enactment of this Act."

Appendix

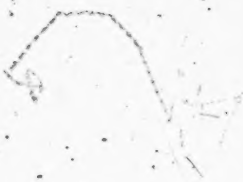
1936 Amendment to Section 602½(a) as Originally Passed by the Senate and as Subsequently Revised by the Conference Committee and Finally Passed.

Senate Amendment

"(a) There is hereby imposed upon the first domestic processing of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts with respect to any of which oils, fatty acids, or salts there has been *no previous first domestic processing* and no import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, a tax of 3 cents per pound to be paid by the processor."

Revised Amendment

"(a) There is hereby imposed upon the first domestic processing of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts, a tax of 3 cents per pound to be paid by the processor, *but the tax under this section shall not apply (1)* with respect to any fatty acid or salt resulting from *a previous first domestic processing taxed under this section* or upon which an import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, or *(2)* with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been *a previous first domestic processing* or upon which an import tax has been paid under such section 601(c)(8)."



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IN THE

Supreme Court of the United States

October Term, 1943

Nos. 38 and 39

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

October Term, 1943

Nos. 38 and 39

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

The opinion of the District Court is reported in 37 F. Supp. 794. The opinion of the Third Circuit Court of Appeals, the opinion on Rehearing modifying the original opinion and as itself modified by the order of November 11, 1942, and the dissenting opinion of Judge MARIS on Rehearing are reported in 130 F. (2d) 913.

Statement of Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. 347, c. 229, 43 Stat. 938.

Statement of the Case.

These are suits to recover taxes paid under protest under Section 602½ of the Revenue Act of 1934, c. 277, 48 Stat. 763, the pertinent part of which reads as follows:

"Sec. 602½. Processing Tax on Certain Oils.

(a) There is hereby imposed upon *the first domestic processing* of coconut oil, sesame oil, palm oil,

> palm-kernal (sic) oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. * * * For the purposes of this section the term 'first domestic processing' means *the first use in the United States*, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed * * *."[1]

The Act was passed and the tax became effective May 10, 1934. On August 17, 1934, the Commissioner of Internal Revenue issued Regulations 48 under Section 602½. Subdivision (l) of Article 1 of the Regulations interprets the phrase "the first domestic processing" as used in Section 602½ as follows:

> "(l) First domestic processing means the first use in the United States *on or after the effective date of the Act*. At all times in these regulations, the term processing or first domestic processing will be deemed to be synonymous with 'use' or 'first use in the United States *on or after* the effective date,' respectively, and will include the meanings implied in the latter terms by subdivision (k) above."

The words "on or after the effective date of the Act" are not in the Statute. They are an interpolation, and the question in these cases involves the right of the Commissioner of Internal Revenue to make that interpolation.

All of the facts are stipulated (Rec. pp. 8-18, 19-28). For present purposes they may be summarized as follows:

Petitioner, a Delaware corporation, with its principal office in Jersey City, New Jersey, is and was engaged in the

[1] Where italics are used in quotations, it will be understood that the emphasis is ours unless otherwise noted.

business of manufacturing and selling soaps and other products in the manufacture of which it processed palm kernel oil, sunflower oil, palm oil and coconut oil. All of the coconut oil involved herein was of Philippine origin or was made wholly from materials grown or produced in the Philippine Islands.

On May 10, 1934, the day on which Section 602½ became effective, petitioner had on hand oils specified in that section which had already received from one to four separate and distinct processings within the United States. These processings were refining, dehydrating, deodorizing and bleaching and all are recognized in Regulations 48 (and by the Court below) as domestic processings within the meaning of Section 602½. However, such oils were subjected to a further processing after the effective date of the tax and pursuant to the above regulation and interpolation the tax was levied on such further processing after May 10, 1934, although the processing so taxed was in each case either the second, third, fourth or fifth processing in the United States. It is the taxes so levied which petitioner seeks to recover.

The first suit (No. 38) involves taxes in the amount of $1,476,507.81 paid by petitioner with respect to the further processing during the period May 10, 1934-April 30, 1935, inclusive, of oils which had already so received one to four domestic processings prior to the effective date of the statute. Similarly, the second suit (No. 39) involves $885,874.56 of taxes paid by petitioner with respect to the further processing during the period May 1, 1935-January 31, 1937, inclusive, of similar processed forms of oils which likewise had already received one to four domestic processings prior to the effective date of the statute. Both suits were brought pursuant to Paragraph 20 of Section 24 of the Judicial Code, as amended February 24, 1925 (43 Stat. 972, Ch. 309, 28 U. S. C. A. 41 (20)).

The suits were consolidated for trial upon Stipulations of Facts. The District Court rendered its opinion on March 20, 1941 (Rec. pp. 1-7), and held that the Act should be construed to mean that the tax was to be levied on "the first domestic processing occurring *after the section became law*" (Rec. p. 5) and that, consequently, the taxes had been properly levied and collected (notwithstanding that in point of fact the processings so taxed were the second, third, fourth or fifth domestic processings). On April 23, 1941, judgments were entered dismissing the complaints (Rec. pp. 1, 18) and on July 19, 1941, appeals were taken to the Circuit Court of Appeals for the Third Circuit.

On March 31, 1942, the Circuit Court of Appeals filed its unanimous opinion sustaining the District Court (Rec. pp. 29-37) and judgment of affirmance was entered. Thereupon, on appellant's petition, a rehearing was had and on August 21, 1942, the Circuit Court of Appeals filed a *majority* opinion (Rec. pp. 42-44), again sustaining the District Court and judgment of affirmance was again entered. Judge MARIS, who had concurred in the original opinion and affirmance, dissented and filed a separate opinion (Rec. pp. 44-46). A Petition for a Second Rehearing was entertained but denied by order entered November 11, 1942, which order materially modified the majority Opinion on Rehearing by deleting the greater portion of it (Rec. p. 50). This Court denied a Petition for Writs of Certiorari on May 24, 1943. Thereafter, on June 1, 1943 the Circuit Court of Appeals for the Seventh Circuit rendered a decision in the case of *Durkee Famous Foods, Inc.* v. *Harrison*, 136 F. (2d) 303, in conflict with the decision of the Court below, and this Court, upon a Petition for Rehearing, entered an order on June 14, 1943 granting the Writs.

The question upon which this conflict of Circuit Courts of Appeals arose—now before this Court for final determi-

nation—is whether a second, third, fourth or fifth domestic processing may constitute "the first domestic processing" within the meaning of the Act and may be the taxable event.

Specification of Assigned Errors.

1. The Court below erred in holding that the tax imposed by Section 602½ upon "the first domestic processing" applied to the processings involved in these suits which were in fact second, third, fourth or fifth domestic processings.

2. The Court below erred in holding that Regulations 48 issued by the Commissioner of Internal Revenue correctly interpret the taxing phrase "the first domestic processing" in Section 602½ of the Revenue Act of 1934 (specifically defined therein as "*the first use in the United States*, in the manufacture or production of an article intended for sale") as meaning "the first use in the United States *on and after the effective date of the Act.*"

3. The Court below erred in holding that the rule of prospective operation of statutes requires an interpretation of the word "first" as meaning first after the effective date of the Act and justifies the interpolation of the words above italicized, whereas the proper application of the rule "should merely result in imposing the tax upon those processings *within the statutory definition* which actually took place after the effective date of the Act, not in modifying the definition so as to impose the tax upon transactions which upon the normal application of the rule would have been exempt," as stated by Judge MARIS in his dissenting opinion (Rec. p. 45).

4. The Court below erred in holding that Section 702(a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, page 1742,

amending Section 602½, shows that "it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not,'" thus in effect holding that every "first domestic processing" is a taxable processing, when the express language of the amendment recognizes in exemption clauses (1) and (2) that not every first domestic processing is taxable but that there would be previous first domestic processings taxed under this section (*i. e.*, those occurring after May 10, 1934) and previous first domestic processings which were untaxed (*i. e.*, those occurring before May 10, 1934).

5. The Court below erred in failing to apply the principle that doubts as to the construction of tax statutes should be resolved in favor of the taxpayer and against the Government.

Summary of Argument.

At the outset petitioner wishes to make it entirely clear that it *is not claiming the benefit of any exemption*, express or implied, under the statute. The question is not what Congress has exempted from the operation of the statute but what Congress has *taxed* under it.

This taxing statute must be applied so as to give to the words employed their usual and normal meaning and the Courts may not by implication extend or enlarge its scope beyond the clear import of the language used. This principle requires that the words "the first domestic processing" should be construed to mean the first or earliest use in fact in the United States in the manufacture of an article intended for sale. The tax is imposed on *the first* domestic processing and does not apply to a second, third, fourth or fifth processing.

The derivation from the Agricultural Adjustment Act, c. 25, 48 Stat. 31, of the provisions of Section 602½ as a whole and of the phrase "the first domestic processing" in particular, and the purpose of Congress to supplement that Act by Section 602½, show that that phrase was intended to have the same meaning in Section 602½ as in the Agricultural Adjustment Act, viz., the first domestic processing in fact and not a second or subsequent processing and that no processing tax was to attach if the first processing had been completed before the effective date of the tax.

The legislative history of Section 602½ shows clearly that the specific purpose of Congress was *to restrict future imports* and thus protect the American farmers' products against further importation into the United States of the specified oils by levying a tax on their first actual use within the United States. The tax contemplated was upon the first use after entry and there was no thought of taxing any subsequent processing or use. A tax on oils already in process of conversion in the United States into finished products would not further the purpose of the tax.

The 1936 amendment of Section 602½ does not show that oils domestically processed before May 10, 1934 were to be taxed, but shows on the contrary that the amendment recognizes that such oils were not subject to the tax.

The rule of prospective operation of taxing statutes simply means that the tax will not be retroactively applied to transactions occurring prior to the effective date of the tax unless a contrary intent is shown; in the cases at bar it means that "the first domestic processing" is taxable only when such processing occurs on or after May 10, 1934. No contrary intent is shown here but all of the indicia from which one normally judges the intent of Congress indicate clearly that Congress intended to tax only the earliest proc-

essing in the United States in fact and did not intend to tax any second or subsequent processing.

Regulations 48 were not made applicable to Section 602½ by paragraph (f) thereof, as was apparently held by the Court below; they were not in existence when Section 602½ was passed.

The inference that Congress intended to tax the first domestic processing after the effective date of the Act which the Circuit Court of Appeals for the Second Circuit in *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. (2d) 438, draws from the absence of an express provision that such processing is not to be taxed, is untenable because it assumes as a premise that in the absence of such provision such processing would be taxed, *i. e.*, it assumes as a premise that "first" means "first after the effective date of the Act," which is the thing to be proved.

The redundancy supposed by that Court to reside in the original act as interpreted by the taxpayer is not to be weighed against the substantial evidence that Congress intended that "first" should mean "earliest," or against the inexplicable redundancy which the Court's interpretation creates in the 1936 Amendment.

The purpose, as viewed by that Court, of the limitation in Section 602½ with respect to the taxation of mixtures, of avoiding double taxation, does not render the Treasury construction of "first domestic processing" any more reasonable than the taxpayer's because either construction effectuates that purpose.

If there be any doubt as to the meaning of the statutory language, such doubt should be resolved in favor of the taxpayer and against the Government.

ARGUMENT.

POINT I.

Taxing statutes should be applied so as to give to the words employed their usual and normal meaning and the scope of such statutes should not be extended or enlarged by implication beyond the clear import of the language used. This principle requires that the words "the first domestic processing" be construed to mean the first or earliest use in fact in the United States.

These oils commonly undergo successive processings in the course of manufacture of finished articles, and in clear language Section 602½ levies the tax upon "the *first* domestic processing" which is defined to mean "*the first use in the United States* in the manufacture or production of an article intended for sale." In the cases at bar, the tax was actually collected upon second, third, fourth or fifth domestic processings. There is no dispute with respect to the meaning of the words "domestic processing" or "use in the United States." The Government concedes that the oils in question had already been domestically processed (used in the United States), before May 10, 1934, the effective date of the tax. The dispute arises with respect to the meaning of "the first."

"First" is defined in Funk & Wagnalls New Standard Dictionary, 1942, as meaning "Prior to all others in time or occurrence; earliest, as the first snow of the season." It is indisputable that the ordinary or normal meaning of "the first use in the United States in the manufacture or production of an article intended for sale" is the earliest use in the United States in manufacture—that use in the

United States in manufacture which precedes all others in point of time. "Earliest" is precisely the meaning which the Government gave to the word "first" in construing the tax similarly levied upon "the first domestic processing" under the Agricultural Adjustment Act, as will be presently shown. No other meaning can be ascribed to the statutory language without reading into the statute something which Congress did not put there. The Treasury definition differs from the statutory definition in two respects. The Treasury definition leaves out the words in the statutory definition here italicized: "first use * * * *in the manufacture or production of an article intended for sale,*" and puts in their place the italicized words in the phrase "first use *on or after the effective date of the Act.*"

The opinion of the Court below recognized that "if we take the literal meaning of the word 'first', we must concede that it means in advance of all others, the earliest" (Rec. p. 35)—in this case the earliest use in manufacture in the United States. However, the majority of the Court did not give "first" its literal meaning, which is its usual meaning, for the assigned reason, *inter alia*, that "Obviously Congress could have made its intention very plain by adding a very few words to the phrase 'first domestic processing' such as 'in point of time,' if that body had in mind the end which the appellant contends it had" (Rec. p. 35). But that is what the phrase normally means. Why should Congress add redundant words merely to make it plain that "first" means first? If, however, "first" had been intended to mean "first after the effective date of the tax" then, to be sure, Congress should have said so.[1]

[1] In *Shwab* v. *Doyle*, 258 U. S. 529, the Court said (p. 536): "If Congress, however, had the purpose assigned by the Commissioner, it should have declared it; when it had that purpose it did declare it."

But Congress did not say so. On the contrary Congress defined "the first domestic processing" to mean "the *first* use in the United States *in the manufacture or production* of an article intended for sale." It is the first use in manufacture—not the first use after the effective date of the Act—that Congress taxed. These oils commonly undergo successive processings in the course of manufacture of finished articles and the first such processing after the oils reached this country is the processing taxed. This is further evidenced by the explanatory reports which accompanied the introduction of the original bill and the Conference Committee revision. House Report No. 704 explains the tax as follows:

> "This section imposes a processing tax on coconut oil and sesame oil. 'Processing' is defined as *the first use* of the oil *in the manufacture or production* of an article for sale."

Conference Report No. 1385 explains that "the first domestic processing" is "defined as *the first use in commercial manufacture or production.*"

When Congress intended to convey the thought of "after the effective date of this act" it did so. In the very subdivision of Section 602½ here under consideration, Congress twice used the phrase "after the date of the enactment of this Act,"[1] which it so conspicuously did not use in defining "first domestic processing" and which the Government, and the Court below, have written into the statutory definition. In Section 602 (App. p. 75) of the same Act levying an import duty upon certain imported whale, fish and marine-animal oils which had been previously in-

[1] See Section 602½, Subdiv. (a) Clause (C). (App. p. 76).

cluded by the Senate with the oils here in question[1] Congress specifically provided:

> "The tax on the articles described in this paragraph shall apply only with respect to the importation of such articles *after the date of the enactment of the Revenue Act of 1934* * * *."

If Congress had intended to tax "the first domestic processing after the effective date of the Act," it would have used plain and unmistakable language to express its intent, as it did in Section 602.

Section 602, as enacted, took the form of an amendment to the Revenue Act of 1932 and imposed an import duty. Obviously an import duty must be levied and collected when the foreign merchandise passes through the custom-house and, as a practical matter, cannot be applied retrospectively to catch foreign merchandise which has already cleared the custom-house prior to the effective date of the duty. Nevertheless, to clearly express its intent, Congress inserted the phrase "after the date of the enactment of the Revenue Act of 1934." When Congress took such an abundance of caution to state that the import duty applied only to importations after the date of enactment of the 1934 Act—when that obviously *was not necessary*— is it to be supposed that Congress would have failed to state that "first domestic processing" was intended to mean first after the effective date of the Act, if that had been its intent—when that obviously *would have been necessary* to make such meaning clear?

The fact that Congress took the trouble to define the phrase "the first domestic processing" gives added weight to the circumstance that it was defined to mean "the first use in the United States" and was not defined to mean "the first use in the United States after the effective date of the

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[1] See Senate Report 558; *infra*, page 48.

Act." Moreover, it will be shown that the taxing language of Section 602½ was taken from the Agricultural Adjustment Act and that it had already been established at the time of the enactment of Section 602½ that the phrase "the first domestic processing" in the Agricultural Adjustment Act meant the earliest in point of time and did not mean the first after the effective date of the tax. If under those circumstances Congress had intended the phrase to have a different meaning in Section 602½, it is even more significant that when Congress defined the phrase in Section 602½ it did not indicate that the phrase now had a new meaning.

We quote briefly from a few of the many cases which enunciate the rule that should be applied.

In *United States* v. *Merriam*, 263 U. S. 179, the Court said (p. 187):

> "• • • *But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used.* If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

In *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, the Court said (pp. 217, 219):

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. • • •
>
> "While entitled to respect, as such decisions [of the Internal Revenue Department] are, they *cannot enlarge the meaning of a statute enacted by Congress.*"

And again in *Thompson* v. *United States*, 246 U. S. 547, the Court lays down the rule as follows (p. 551):

> "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

Also, in *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, the Court said (p. 277):

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. *We are therefore bound by the words employed*, and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. * * * *Construction may not be substituted for legislation.*" (Citing cases.)

In *Old Colony Railroad Company* v. *Commissioner*, 284 U. S. 552, 560, involving the meaning of "interest * * * on its indebtedness" in the Revenue Act of 1921, Mr. Justice ROBERTS, speaking for an undivided Court, applied the rule that

> "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but exigency of a hard

> case and ingenuity and study of an acute and powerful intellect would discover."

In *Deputy* v. *duPont*, 308 U. S. 488, one of the questions before this Court was whether the disbursements in question constituted "ordinary and necessary expenses paid or incurred." In holding that they did not, this Court said (p. 493):

> "* * * And when it comes to construction of the statutory provision under which the deduction is sought, the general rule that '*popular or received import of words* furnishes *the general rule* for the interpretation of public laws,' Maillard v. Lawrence, 16 How (US) 251, 261, 14 L ed 925, 930, *is applicable.*"

As "first" means "prior to all others in time or occurrence; earliest," to add to the statute the words "on or after the effective date of the Act" is clearly to extend the statute "by implication beyond the clear import of the language used" or, in the words of the *Standard Brewery* case, *supra*, to "enlarge the meaning of a statute enacted by Congress." It certainly cannot be said that the language used, construed as petitioner construes it, does not express "an intention reasonably intelligible and plain"; it "leads to nothing impossible or unreasonable." Thus, in the language of the *Thompson* case, "it must be accepted without modification by resort to construction or conjecture."

POINT II.

The derivation from the Agricultural Adjustment Act of the provisions of Section 602½ as a whole and of the phrase "the first domestic processing" in particular, and the purpose of Congress to supplement that Act by Section 602½ show that the phrase was intended to have the same meaning in Section 602½ as it had under the A. A. A., viz., the first domestic processing in fact and not any second or subsequent processing, and that no processing tax was to attach if the first actual processing had been completed before the effective date of the tax.

(1) Derivation of Language Used in Section 602½.

The same Congress which enacted Section 602½ had at its prior session enacted the original Agricultural Adjustment Act (hereinafter referred to as A. A. A.), 48 Stat. 31, approved May 12, 1933. To provide funds for the benefit payments contemplated in that Act, Congress adopted *an entirely new form of excise tax*, namely: a tax levied upon *"the first domestic processing"* of basic agricultural commodities (Section 9).

It is not questioned that the provisions of Section 602½ were derived substantially and largely verbatim from the provisions relating to the processing tax under A. A. A. including specifically the language levying the tax upon "the first domestic processing." For the Court's convenience, we have quoted in the Appendix (pp. 77-81) in parallel columns, corresponding provisions of the A. A. A., approved May 12, 1933 and of Section 602½, approved May 10, 1934.

The Court below conceded this, saying "We entertain little doubt that the provisions of Section 602½ were derived largely from Section 9(a)" (Rec. p. 32).

(2) Meaning of "The First Domestic Processing" at the Time Section 602½ Was Enacted.

What was the meaning of "the first domestic processing" as used in the A. A. A. from which that phrase was borrowed in enacting Section 602½? A tax levied merely upon "the domestic processing" of the products covered by that Act would have been a multiple tax because those products, like the oils involved in this suit, are for the most part subjected in the normal course to successive processings before they are converted into finished articles of commerce. It was therefore necessary to designate "the *first* domestic processing" as the taxable transaction—the first of any series of processings. This Congress did, as the Treasury Department recognized.

During the first six months following the enactment of the A. A. A., the Treasury Department gave careful consideration to the application of the tax imposed thereby upon "the first domestic processing" and issued three different versions of Article 7, Regulations 81, relating to the time when such tax attaches (App. pp. 88-89); but throughout such changes the Treasury Department consistently recognized that the earliest processing in the United States in point of time, whether occurring before or after the effective date of the Act, was "the first domestic processing" within the meaning of A. A. A. The final form of the Regulation, adopted November 2, 1933 to be effective retroactively to July 9, 1933, reads as follows (T. D. 4403 C. B. XII-2, p. 430):

> "Art. 7. When tax attaches.—The tax is imposed upon *the first domestic processing*, and is measured by the amount of the commodity put into such processing. The tax attaches to a particular quantity of

> the commodity (1) *if it is in process on the effective date, provided the first domestic processing has not been completed prior to that date,* or (2) if the first domestic processing is begun during the period while the tax is in effect, provided it is completed before the termination of the tax. Where the first domestic processing of a particular quantity of the commodity is completed prior to the effective date, but on the effective date such quantity is in secondary processing, it is subject to the tax on floor stocks (see Regulations 82)."

It will be noted that if "the first domestic processing of a particular quantity of the commodity is completed prior to the effective date" *no processing tax attaches to any subsequent processing.*

The Court below recognized that (Rec. p. 32):

> "The Treasury Regulations (Article 7 of Treasury Regulations 81, approved July 12, 1933) and the amendments thereto promulgated by the Treasury Department in connection with Section 9(a) of the Agricultural Adjustment Act bear out the appellant's assertion *that the Treasury Department construed the phrase 'the first domestic processing'* to mean *the first in point of time.*"

The majority of the Court below declined, however, to give the same taxing phrase in Section 602½ the same meaning given to it by the Treasury Department under the A. A. A. though recognizing that if the two taxes "are deemed to be *in pari materia* the two sections should be interpreted similarly." The majority held that the two Acts were not *in pari materia* because Congress also provided in a Supplementary Revenue Provision of the Agricultural Adjustment Act for a floor-stock tax upon commodities already proc-

essed[1] but did not enact a similar floor-stock tax to supplement Section 602½ (Rec. p. 33). But the question whether Section 9 of the A. A. A. levying a processing tax and Section 602½ levying a processing tax in language copied from Section 9 are *in pari materia* is not affected by the circumstance that in Section 16 of the A. A. A. there is also levied a supplementary floor-stock tax. The floor-stock tax may arguably furnish an additional reason for construing the phrase "the first domestic processing" in its normal and usual sense. But the absence of that additional reason certainly gives no ground for construing the phrase otherwise than in its normal and usual sense. The same Congress used the same taxing phrase in two statutes—the second designed to close a "loophole" in the first, as we shall show—and Congress in effect adopted the then administrative interpretation of the phrase "the first domestic processing" in the first Act by defining it in the second Act to mean "the first use in the United States." Surely there could be no stronger case for the application of the principle that the same taxing language in successive Acts should be similarly construed.

Furthermore, as the Seventh Circuit in the *Durkee* case, *supra*, in disagreeing with the reasoning of the Court below, aptly observes (App. to Petition for Rehearing, p. 19):

> "As already shown, Congress was attempting to protect the farmer from competition with imported

[1] A. A. A. contained secondary "Supplementary Revenue Provisions" for (1) a compensatory import tax under Section 15(e) upon the importation into the United States of any article processed or manufactured wholly or in chief value from any basic agricultural commodity upon which the processing tax was then in effect, and (2) a floor-stock tax under Section 16(a) upon any article processed wholly or in chief value from any basic agricultural commodity subject to the processing tax and held for sale at the time the processing tax upon that particular commodity went into effect, with an exception in favor of retailers' stocks sold within 30 days (App. pp. 87, 88).

oils largely from the Philippines. By reason of the Philippine Independence Act, it was precluded from placing an import duty on such oils. It sought to accomplish the same objective by imposing a tax upon the 'first processing,' defined as the 'first use in the United States.' The imposition of the floor tax upon oil already processed would have been no aid in the accomplishment of the desired purpose. The revenue feature of both the Act under consideration and the Agricultural Adjustment Act was purely incidental and not for the benefit of the Federal Government. *In the former, the taxes on coconut oil were to be segregated in the Treasury and paid to the Philippine Islands. In the Agricultural Adjustment Act, the taxes were to be segregated and paid to the American farmer as benefits.* Furthermore, *the effect of the construction* sought by the government as applied to the instant situation *would come close to imposing a floor tax by regulation.* The fact that Congress, after imposing a floor tax in the Agricultural Act, made no such provision in the instant Act, is also a significant circumstance that Congress did not intend that a tax should be imposed upon the designated oils processed prior to the enactment."

Although Congress in Section 602½ borrowed from the Agricultural Adjustment Act the tax on "the first domestic processing," its failure to borrow therefrom the floor-stock tax is significant. This was no unintentional omission. Such a tax was urged by the cotton-seed oil producers at the hearings before the House Ways and Means Committee (Committee on Ways and Means Hearings, Revenue Revisions 1934, p. 600) but no floor-stock tax was included in the Act.

That was a plain indication that Congress did not intend to tax those oils which had been domestically processed prior to May 10, 1934. If Congress had been concerned to tax domestically processed oils on hand on May 10, 1934, it would have heeded the plea for a floor-stock tax such as was provided for in A. A. A. Despite the election not to levy a floor-stock tax, the Commissioner construed Section 602½ so as to tax all such processed oils which petitioner and others had on hand, *thus accomplishing the same practical effect as to those oils as if a floor-stock tax had been enacted.* Are we to assume, despite the intentional omission of a floor-stock tax from Section 602½, that Congress nevertheless intended what is tantamount to a floor-stock tax on those oils but left the effectuation of that intent to the hazard of a new administrative interpretation of "first domestic processing" contrary to the then administrative construction thereof?

The Commissioner has supplied the intentional omission of Congress by an act of administrative construction—an utterly indefensible procedure.

It is submitted that (1) the derivation of the language used in Section 602½, (2) the administrative interpretation of the taxing phrase "the first domestic processing" then in effect, and (3) the adoption of that interpretation by defining said taxing phrase in Section 602½ to mean "the first use in the United States," without adding "after the effective date of the Act," all show that Congress intended to levy the tax upon the first use of the imported oils after they reach the United States, with no thought of taxing any subsequent use.

POINT III.

The legislative history of Section 602½ shows that Congress intended to lay on imported vegetable oils the same processing tax to which the domestic products with which the oils compete were already subject under the Agricultural Adjustment Act—a tax on "the first domestic processing" in fact, not a tax on any subsequent processing.

In none of the other cases decided in favor of the Government has the attention of the Courts been called to the legislative history of Section 602½. The Government's arguments—as well as the arguments in behalf of the taxpayers in those cases—have been predicated upon an erroneous premise that this is an ordinary taxing statute whose primary purpose is to obtain revenue.

We shall show the following in this section of the brief:

1. The occasion for the enactment of Section 602½ was the enactment in the preceding year of the Agricultural Adjustment Act which provided for a tax on "the first domestic processing" of certain domestic agricultural products. Among those products were products which were in competition with the foreign vegetable oils. Protection against those foreign oils had been vainly sought for several years. Under the taxation provided for in A. A. A. those domestic products were at a still further disadvantage against the foreign oils, and the purpose of A. A. A. to restrict production and so raise prices would be frustrated, it was argued, if further tax-free importations of the competing foreign oils were permitted. Those were the considerations which induced the passage of Section 602½. Revenue was not its purpose.

2. The tax levied by that section was imposed in lieu of a duty. It was intended to have the effect of a duty, *i. e., to restrict future importations.* Congress was not concerned to tax domestically processed oils already on hand in this country.[1]

3. Congress effected the protection, now at last recognized as necessary because of the tax provided for in A. A. A., by the very appropriate imposition of the same kind of processing tax upon the foreign oils.

4. The Congressional committee reports show the same motive and the same intent.

1. The reason for the enactment of Section 602½.

All of the oils taxed under the statute are imported oils. For many years prior to the imposition of this tax there was persistent agitation by producers of domestic fats and oils for a protective tariff on these foreign oils. The Court below attributed the enactment of Section 602½ to this "continuous agitation for the protection of domestic farm products from duty-free coconut oil and other competitive vegetable oils" (Rec. p. 34). That was in part the reason but the Court ignored the real point of that history which was this: Not until the domestic products with which these foreign oils competed were made subject to the processing tax provided for in A. A. A. did Congress recognize a need for protection against the foreign oils. That protection it then provided by levying upon the foreign oils the same processing tax to which the domestic products were subject under A. A. A.

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[1] That the tax would fall on such crude oils as might already be in the country when the tax went into effect was merely an inseparable incident of a tax of this nature. The taxation of oils previously imported was no part of the specific Congressional objective, as will abundantly appear.

When the Revenue Act of 1928 was under consideration, efforts were made to interject in that bill amendments to the Tariff Act of 1922 so as to impose *import duties* of 2 to 4 cents per pound upon the various imported oils, but they were rejected (Cong. Rec. Vol. 69, pp. 8483, 8484, 9203). When the Tariff Act of 1930 was under consideration, a number of amendments were offered from the Senate floor, (a) to levy protective *import duties* upon competing foreign oils and (b) to remove from the free list certain foreign oils which were free when denatured so as to be inedible. All these amendments were rejected (Cong. Rec. Vol. 71, p. 4914, *et seq.;* Vol. 72, pp. 5717, 5942). When the Revenue Act of 1932 was under consideration amendments were proposed from the Senate floor to levy *import duties* upon these foreign oils, but those amendments also were rejected (Cong. Rec. Vol. 75, pp. 10249, *et seq.* 11095-11116). In the first session of the 72nd Congress a separate bill (H. R. 12835) was introduced providing for an *import duty* upon these foreign oils, but the bill was never reported out by the House Ways and Means Committee. This continued agitation for protection of domestic farm and dairy products against the competition of these imported oils gained new impetus when the domestic products were themselves burdened with a processing tax under A. A. A.; and the agitation came to final fruition in the passage of the Act involved in this suit.

The proponents of this tax successfully contended that since Congress, under the A. A. A., had already provided for a tax upon "the first domestic processing" of certain products of the American farmer and dairyman, the domestic producers were now under a further competitive disadvantage with the cheaper foreign oils and there was an immediate necessity for protecting the American farmer and dairyman against the further importation of these

foreign oils (Cong. Rec. Vol. 78, pp. 6314-6325). Moreover, the declared purpose of A. A. A. was to restore to basic agricultural commodities (defined in the Act as wheat, rice, tobacco, *cotton, field corn, hogs, milk and milk products*[1]) a purchasing power for the farmer equivalent to the purchasing power of such agricultural commodities during the base pre-war period of August 1909-July 1914 (Section 2). To attain this end the Secretary of Agriculture was authorized to make agreements for reduction in the acreage and production of such basic agricultural commodities, whenever he deemed it necessary, and to provide for rental or benefit payments to those farmers who so reduced their production (Section 8). The purpose of A. A. A. to raise the prices of domestic products would be frustrated, said the proponents of Section 602½, if the cheaper competitive foreign oils were to be imported into this country tax-free.

In explaining the reason for the oil processing tax Chairman Doughton of the House Ways and Means Committee said (Cong. Rec. Vol. 78, p. 2513):

> "On account of the unusual conditions existing it was thought by a good many that as we were placing a processing tax on domestic commodities and limiting the production of our farmers that we might put some restriction on the commodities from abroad that compete with our American commodities."

Similarly, the ranking minority member of the House Ways and Means Committee, Congressman Treadway (Mass.) explained the necessity for this tax in the following language (Cong. Rec. Vol. 78, p. 2658):

> "Imported coconut and sesame oils compete directly and indirectly with domestic fats and oils.

[1] By an amendment approved April 7, 1934, 48 Stat. 528, "cattle" and "peanuts" among other farm products were added to the "basic agricultural commodities" covered by A. A. A.

> This competition occurs chiefly with cottonseed oil, lard, tallow, and butter. *Under the Agricultural Adjustment Act, Congress has attempted to restore agricultural prices to their pre-war parity; but this legislation fails to take care of the competition of these foreign oils with domestic oils and fats.* While domestic production is being restricted, imported oils and fats are coming into this country in increasing quantities. * * *
>
> * * *
>
> "Due to the low price of these foreign oils, produced at a minimum cost by Philippine workers on a standard of living far below that of the American farmer, and through their large use in the manufacture of soap, vegetable shortening, and oleomargarine, they establish the price of competing domestic oils and fats and bring about destructive and ruinous competition."

Congressman Shallenberger (Nebraska) was concededly the member of the House Ways and Means Committee who was responsible for the oil processing tax being included in the Revenue Bill of 1934 (Cong. Rec. Vol. 78, p. 2513) and it was he who was called upon by Chairman Doughton to explain the reasons for the tax because "He has made a more thorough study of this matter than any other member of the committee." In explaining to the House the reasons for, and the purposes of, this tax, Congressman Shallenberger quoted statistics showing the tremendous growth in recent years in the importation of Philippine coconut oil and continued (Cong. Rec. Vol. 78, p. 2529):

> "The Department of Agriculture is working as hard as it possibly can to lift the prices of American farm products to a level that will give the farmer a fair return. How can this be done as to dairy products, meat products, animal fats, and cottonseed and other vegetable oils, if imported oils are permitted

to flood our markets duty-and-tax free and sold at 2½ cents per pound at the American seaboard?

• • •

"The Government is trying to establish a price for corn by loaning farmers 45 cents a bushel on the corn in the crib. The price of corn is dependent upon the price of fat hogs and fat cattle. Eighty-five percent of our corn crop is fed upon the farm. How can the price of corn be maintained at 45 cents a bushel and hogs sell at 3 or 3½ cents per pound at the farm? Fat hogs and fat cattle are dirt cheap because foreign oils have displaced our lard and fats in our home markets. The American livestock farmer is simply being cooked in cheap coconut oil.

"Last December, just before I came to this session of Congress, I called on one of my farm neighbors to talk over the livestock situation. I found him out in the feed lots feeding his hogs. He had placed a big basket of ear corn on the ground and had backed up to the hog pen and was throwing the corn over his shoulder to the hogs in the pen. I said to him, 'Joe, why do you feed your hogs in this strange fashion?' He said, 'Well, you see, I've lost so much money feeding this high-priced corn to these low-priced hogs I cannot look a hog in the face any longer, and I have to feed them backward.'

• • •

"I want you to note that this 5-cent excise tax[1] to raise the price of foreign oils that compete with our home products *fits in with the program of the Agricultural Adjustment Administration in* its efforts to raise prices of American farm products to a living level. The Agricultural Adjustment Administration proposes a processing tax of 5 cents a pound on hogs; a similar tax on cattle; a tax of 5 cents on dairy products; and a compensating tax of 5 cents on oleomargarine.

• • •

[1] As originally proposed and passed by the House. Section 602½ (then Section 602) levied a processing tax of 5 cents per pound on coconut and sesame oils.

"This whole question, which is so vital to the welfare and recovery of the Nation, may be summed up in one sentence. We must consider the interests and welfare of the American farmer first. We will never get the farmer out of the ditch of depression into which he has fallen *unless we relieve him from the unfair foreign competition which is destroying him.*"

Said Congressman Johnson of Minnesota (Cong. Rec. Vol. 78, p. 2612):

"The American farmer for years has petitioned Congress to aid them in their just fight for a home market *that would be protected against this pernicious flood of coconut and sesame oils.* • • • Today every farmer in this country is anxiously awaiting Congress' action on this part of the revenue act. We must not fail them now. • • • *We must give the farmer the protection that his home market needs.* • • • *Let us not desert him on this real chance to help.*"

Congressman Knutson (Minnesota), also a member of the Ways and Means Committee, in debating this tax on the floor of the House said (Cong. Rec. Vol. 78, p. 2614):

"The large users of vegetable oils naturally oppose this tax *because it will tend to force them to the use of American-produced fats and oils.* Four or five attempts were made in the committee to strike out or modify the Shallenberger amendment, but our forces held without a break • • •.

"• • • The American farmer has seen his products displaced in the domestic market by huge importations of vegetable oils and copra from the Orient. Our farmers are asked to reduce production but the Government is giving no heed to the agricultural products that are coming in and replacing the reductions effected. *In other words, every reduction made*

merely serves to increase the market for foreign products so the American farmer does not gain any benefit from the reduction program. There are but two methods that will help him: Embargoes on all imports that compete with home produced products, or compensatory taxes on such imports. In this instance we seek to impose a tax which in my judgment is preferable."

In the course of the debate, Congressman Brooks (Pennsylvania) said (Cong. Rec. Vol. 78, p. 2702):

"The object of this tax is to raise the whole price structure of not only the oils and fats but will have its effect on all dairy products as well as prices of hogs and beef cattle. I sincerely believe that *it will be impossible for the Agricultural Adjustment Administration to raise these prices unless this tax is put on the importation of foreign oils.* If we are right in our policy of excluding Asiatic labor on account of the competition with our own labor, why, *we are justified in curtailing and limiting the importation of products which are so destructive to our domestic products.*"

Congressman Christianson (Minnesota) said (Cong. Rec. Vol. 78, p. 2785):

"To kill several million little pigs will not give us 8-cent hogs if the vacuum thus created can be filled by products from abroad. Vealing calves will not raise the price of butter if the *coconut cow* is permitted to glut our market."

Congressman Dickinson (Missouri), also a member of the House Ways and Means Committee, stated the reason for the tax in these words (Cong. Rec. Vol. 78, p. 2792):

"I actively favored in the committee a 5-cent tax upon coconut and sesame oils, which tax is carried in the pending bill. * * * The farmers of the United States are entitled to this protection *from the im-*

portation of these foreign oils that are destroying the markets for the oils and fats of the farmers of the United States. The cheap importation of foreign oils, particularly from the Philippines, is breaking down the buying power of the farmer and lessening the price of hogs and cattle and corn."

In debating the tax, Congressman Burke (Nebraska) had this to say (Cong. Rec. Vol. 78, p. 2809):

"Shall we continue to tax ourselves to pay the raiser of hogs, to further curtail his production in order to create a larger market in this country for coconut oil.

* * * *

"*This is farm relief that really means something.* The first step is this excise tax on coconut and sesame oils. This provision of the revenue bill should meet general approval."

Similarly, throughout the debates in the Senate, we find that the motive for the oil processing tax was the necessity, created by the processing tax provided for in A. A. A., of protecting the American farmer and his products by levying a tax upon the imported oils. This was succinctly expressed by Senator Byrnes (South Carolina) (Cong. Rec. Vol. 78, p. 6314):

"Mr. President, if there is a processing tax upon hogs, why cannot a competitive tax be levied upon coconut oil if such oil comes in competition with our product?"

Senator Reed (Pennsylvania) of the Finance Committee expressed the same idea in the following colloquy with Senator Tydings (Maryland) (Cong. Rec. Vol. 78, p. 5966):

Mr. Tydings: "* * * The Senator from Pennsylvania knows, I am sure, that *the primary purpose of this*

tax is not revenue, but its primary purpose is to discriminate against the Philippine people.

Mr. Reed: *"The primary purpose of the processing tax is to raise prices and not to raise revenue."*

To the same effect Senator Shipstead of Minnesota (Cong. Rec. Vol. 78, p. 6314):

> *"* * * The purpose of this tax is to raise the price level in the United States of domestic articles that compete with Philippine products.* The purpose is to raise the price of butter, if you please. *It is a price-raising tax."*

Senator Connally of Texas stated the reason for the bill thus (Cong. Rec. Vol. 78, p. 6316):

> "Let us see what else we are doing to the American farmer. We tell him by law how much he has to cut down his cotton production. If he does not do it we are going to put him in jail or otherwise punish him. Every time we cut down our cotton production we cut down our cottonseed. We do not have as much cottonseed oil to sell the next year as we have now. *In the meantime we fill up the gap which we have created in our own product by letting the Philippines send over here larger amounts of oil and more coconuts.* What good does it do to reduce our own production of oil if we are going to permit the Philippines or the Africans or the people in Borneo or Java or the other islands of the seas simply to fill up the gap we are trying to create, by their shipping us some more of their oil that does not require any labor to produce? That is the situation we are facing."

Said Senator Norris (Cong. Rec. Vol. 78, p. 6380):

> "Within the last year or so the administration has started on a farm-relief program. We have limited the production of all, or practically all, farm products. The farmer, concerned with that limita-

tion, finds that fats and oils imported from the Philippine Islands do not have to pay a tax under the tariff law, and therefore, without any tax of any kind levied upon them, come in competition with the fats and oils produced in this country. * * *"

If the purpose of Section 602½ had been revenue, is it conceivable that Congress would have provided, as it did in said section, that the revenue from the principal oil, viz., Philippine coconut oil, should not be paid into the general treasury but should be segregated and paid over to the Philippine Islands? That revenue was not the motivating purpose in enacting Section 602½ is clearly illustrated by the following excerpts from the remarks of Senators Connally and Norris in debating the Norris Amendment (Cong. Rec., Vol. 78, pp. 6381, 6382, 6383):

Mr. Connally: "Mr. President, I desire to ask the Senator a question about his amendment. Suppose the Filipino government should say, 'We will take this tax, and then we will just pay it back to the producer.'

Mr. Norris: "They cannot do it under the amendment.

* * *

Mr. Connally: "If that be true, I cannot see why the amendment would not have the effect of aiding the domestic producer, *because the tax would be paid, and it is immaterial from his viewpoint what is done with it, whether it is thrown in the sewer or given to the Philippine government.*

* * *

Mr. Norris: "But the American farmer is faced with the fact that copra and coconut oil from abroad take the place of the fats he produces at such a price that it is conceded he cannot compete with them. If we by law raise the price of the Philippine product and *give the money back to the Philippine government,*

I do not see where they have much reason to find fault with the legislation.

* * *

"* * * I could stand on this floor for hours and tell of the enormous amount of American-produced fats which have been forced out of the market because of the importation of these particular oils. We have recognized that fact by imposing a tariff upon the same kind of production which comes from every *foreign* country on earth in order to protect the American farmer and protect him from competition that is absolutely ruinous. So the American farmer is worked up about it.

* * *

"Mr. President, I do not believe there is any injustice contained in my amendment. When we shall give the money collected on Philippine products back to the Philippine government, it seems to me we will have compensated them for any wrong that might otherwise have been inflicted. *We shall have not taken a penny of the money ourselves, and we shall have protected the American farmer in the only place where, under the law, there is a loophole. The American farmer cannot get protection unless we do something of this kind.*"

2. The tax levied by Section 602½ was enacted in lieu of a duty and its purpose was to restrict future imports.

It is apparent from the above quotations that Section 602½ was enacted to restrict future imports.[1] But it had become impossible, without a breach of faith, to place an *import duty* on coconut oil coming from the Philippine Islands, the principal source of that oil. The Philippine

[1] For additional excerpts from the Congressional debates showing that Congress intended to restrict future imports of the specified foreign oils and not to raise revenue, see Appendix, pp. 82-84.

Independence Act of March 24, 1934 (Ch. 84, Sec. 6(b), 48 Stat. 456, p. 459, 48 U. S. C. A. 1236(b)) had specifically authorized the importation, free of duty, of 200,000 long tons (440,000,000 lbs.) of Philippine coconut oil each year for a period of ten years. When the section under consideration was introduced into and passed by the House (taxing in its then form only coconut oil and sesame oil), it did not provide for a tax at the point of importation (a duty) but the section levied a tax which would attach to the earliest manufacturing use of the imported oil after it entered the United States, *i. e.*, a tax upon "*the first use in the United States*, in the manufacture or production of an article intended for sale."

In the Senate the debate centered around the tax on Philippine coconut oil and whether such tax constituted a moral, if not a technical legal violation of the Philippine Independence Act (Cong. Rec. Vol. 78, pp. 6308-6324). Senator Harrison, Chairman of the Finance Committee, who was in charge of the bill in the Senate, and many other Senators earnestly urged that the tax was such a violation and that its enactment in the Revenue Bill of 1934, without some concession for Philippine coconut oil, might cause the President to veto the entire bill (Cong. Rec. Vol. 78, pp. 6311, 6317, 6323, 6383). To meet this situation, Senator Harrison proposed an amendment to exempt from the tax 520,000,000 pounds of Philippine coconut oil each year (the average annual importation for the five preceding years, 1929-1933).

That amendment was rejected but to offset the economic impact of this tax upon the Philippines, amendments to subdivision (a) of Section 602½ were adopted (1) providing for a surtax of 2 cents per pound on coconut oil of non-Philippine origin (Conf. Report #1385, App. p. 85),

and (2) providing for the segregation and payment into the Philippine treasury of the entire tax collected on Philippine coconut oil so long as the Philippine government does not subsidize the producers of Philippine coconut oil or the growers of copra from which such oil is extracted (Cong. Rec. Vol. 78, pp. 6379-6389).

Senator Norris proposed the amendment providing for the payment of the Philippine coconut oil tax over to the Philippine government. In introducing his amendment he said (*id.* p. 6380):

> "It seems to me we are confronted with the fact that it is very difficult to do justice both to our wards, the Filipinos, and to the American farmer. When the farmer finds himself thus handicapped, he is justified in the belief that he must have some protection against the importation of coconut oil and copra from the Philippine Islands *which, under existing law, can be brought in without the payment of any tariff tax.*"

Throughout the debates it was recognized that the tax would have the same effect as though a duty had been levied. This is illustrated by the following colloquy between Senators Norris and Tydings (Cong. Rec. Vol. 78, p. 6382):

> Mr. Norris: "The Senator's contention, as I see it, is just the same as though we levied a tax on the products of the Philippine Islands. Technically we could do that; legally we could enact that kind of law and enforce it. Morally it would be wrong. I myself have always opposed *the levying of tariffs* upon the products of the Philippine Islands, particularly when we take into consideration the fact that we are holding them under our government without their consent. It is so abhorrent to think that under those conditions we should levy *a tariff tax* that I should like to find *some way to help the American farmer without resorting to that kind of a remedy.*
>
> * * *

Mr. Norris: "* * * *What is the object of all this legislation? What is the object of all our farm legislation? It is to increase the prices of the products of the farmer. This amendment would have that effect, I admit.* It would raise the price to the consumer of these oils. There is no doubt about that. *That is the object we have in view.*

* * *

Mr. Tydings: "I do not mean that that is the actual way in which it would be carried out, *but it would be the same as if we passed a tariff act levying a tax of 3 cents on those commodities.*"

The purpose of the tax being to restrict future imports it seems clear that Congress did not contemplate a tax upon those foreign oils which the domestic manufacturer had already used in his manufacturing operations prior to May 10, 1934. The levying of a tax on such processed foreign oils already in use by the manufacturer would not have enlarged the market for domestic fats and oils. Nor would it affect the price level. *To the extent of his current supply of processed oils on hand the domestic manufacturer was not a customer for domestic fats and oils as substitute raw materials.* Obviously, no such manufacturer would throw away such processed oils. He would use up his supply of processed oils on hand before he became a customer for domestic fats and oils as substitute raw materials. This is exactly what petitioner did, notwithstanding that under the Commissioner's regulations it was faced with a tax as great or greater than the cost of the processed oil. Because the manufacturer was bound to use up his supply of processed oils on hand and would not substitute domestic fats and oils therefor, the levying of a tax on such processed oils on hand could not affect the price level of domestic fats and oils. A tax upon the first domestic processing after the effective date of the tax of oils which had been previously processed.

would merely have penalized the domestic manufacturer without any consequent benefit to the American farmer. For the same reason, we submit, Congress did not see fit to enact a floor-stock tax as a supplement to the oil processing tax, although the cottonseed oil producers urged such a tax at the hearings. To have imposed a floor-stock tax upon domestically processed oils then being converted into finished products would likewise *not have increased the market for, nor the price of,* domestic farm products as raw materials because the latter could not be substituted for the foreign oils already used as ingredients in the articles then in process of manufacture.

The Court below recognized that Section 602½ was enacted as a substitute for an import duty saying (Rec. p. 34):

> "Congress in order to protect the American farmer, but also to keep faith with the people of the Philippines, substituted for an impost upon Philippine oil the tax provided by Section 602½."

But the Court below in construing the tax did not stop at giving it the effect of an import duty. On the basis of a speculation as to what Congress *might have desired* to do, the Court extended the tax to domestically processed oils already in the United States when the tax became effective. The majority opinion states (Rec. p. 35):

> "Our difficulty in accepting these arguments lies in the fact that *we can see no reason why Congress should not have desired* to protect domestic fats against competitive imported oils whether prior to the passage of the act these had been processed within the United States or not."

If Congress had been free to levy an import duty that clearly is what it would have done and an import duty would not have

reached the processed oils involved in the cases at bar. We need not speculate as to what Congress *might* have desired to do. Its purpose is clearly shown in the debates. It was to restrict future imports. If Section 602½ was intended as a substitute for an import duty, as the Court below found, and if that purpose is accomplished by construing the tax language in its normal and usual sense, what warrant is there for construing "first" in any other sense? There is nothing in the language itself, the Committee Reports or the debates, to indicate that Congress intended in Section 602½ to do more than levy upon the foreign oils a tax upon their first use after they cleared the custom-house; there is no suggestion of protecting domestic fats against foreign oils which at the time of enactment had already been imported and domestically used and were then in the course of being converted into finished products. That suggestion comes only from the majority opinion of the Court below—and then upon pure speculation by the Court as to what might have been the intent of Congress, ignoring the actual intent expressed in the debates.

The Court below could "see no reason why Congress should not have desired to protect domestic fats against competitive imported oils whether prior to the passage of the act these had been processed within the United States or not." We think we have shown an excellent reason—it couldn't be done. We have pointed out that the imposition of a tax on oils already domestically processed and in course of conversion to finished articles could neither have increased the market for, nor the price of, domestic fats and oils as substitute raw materials (*supra*, p. 36).

3. The tax intended to be levied was precisely the same kind of processing tax as had been provided for in A. A. A.—a tax upon the earliest domestic processing.

It is clear from the debates that Congress meant to levy on these foreign oils *the same processing tax* to which domestic products with which they competed were subject under A. A. A.

Throughout the debates, Section 602½ was considered by proponents, supporters and opponents alike, as though it were a supplement to the Agricultural Adjustment Act.

Congressman Reed (New York), a member of the House Ways and Means Committee, in debating this tax on the floor of the House, said (Cong. Rec. Vol. 78, p. 7246):

> "* * * The proposed tax is levied upon the first domestic processing of coconut oil, and this is defined as the 'first use in the United States, in the manufacture or production of an article intended for sale' of coconut and other oils. *Thus the tax is no different in effect from the several processing taxes levied under the Agricultural Adjustment Act* upon basic farm commodities."

In speaking for the tax, Senator Carey said (Cong. Rec. Vol. 78, p. 6311):

> Mr. Carey: "The Senator is aware of the fact that, under the Agricultural Adjustment Act, it is possible for the Secretary of Agriculture to levy taxes on commodities which compete with other commodities. There are on hand in this country a large amount of fats in storage, consisting of butter, lard, tallow, and cottonseed oil, most of which are subject to processing taxes. Does the Senator think it *fair to relieve the Philippine Islands from a tax such as the one under discussion when the American farmer is subject to all these taxes?*
>
> * * *

Mr. Carey: "* * * I cannot see *why they should be exempt* from the payment *of the same tax* we are putting on ourselves."

Senator Reed of the Senate Finance Committee also pointed out the similarity of the two taxes (Cong. Rec. Vol. 78, p. 6312):

> "I am not complaining about the result of our own actions, but I say that when we impose processing taxes which bear so cruelly on our farmers as does the present tax on hogs, for example, we are only treating the Filipinos *as we are treating our own people when we put similar taxes on their products.*"

Senator Shipstead (Minnesota) stressed the identity of the two taxes (Cong. Rec. Vol. 78, p. 6314):

> "I cannot see the difference between putting *a processing tax* upon coconut oil * * * and putting *a processing tax* on hogs or any other things manufactured in the United States."

Senators Borah and Harrison, in opposing the tax, suggested that this matter should be handled under the A. A. A., by amendment if necessary, rather than in the Revenue Act of 1934 (Cong. Rec. Vol. 78, p. 6314).

Mr. Borah: "* * * We have an act by which we could treat them [the Filipinos] as citizens and deal with them the same as with other citizens of the United States, and that is the Agricultural Adjustment Act. There is no reason why these matters should not be dealt with under that act. It may be *that it would require an amendment.* I have not the act before me.

* * *

Mr. Harrison: "I may say to the Senator from Idaho that the Secretary of Agriculture suggested that this matter should be dealt with under the Agricultural Adjustment Act and that we might fix quotas, and processing taxes, and so on."

The following colloquy between Senator Connally (Texas), a member of the Senate Finance Committee, and Senator Borah shows clearly the identity of these two processing taxes. (Cong. Rec. Vol. 78, p. 6316 *et seq.*)

Mr. Borah: "I want to ask the Senator a question which I submitted a few moments ago. Could not all this be done under the present Agricultural Adjustment Act?

Mr. Connally: "It is a long process to have the Department of Agriculture tinkering with the Philippines. It might be done. I have great respect for the opinions of the Senator from Idaho, but whenever I am trying to do something and a man comes up and says, 'This is fine; but why not do it some other way?' I always have a suspicion as to whether he wants me to do it at all or not.

Mr. Borah: "*I am thinking of the fact that the Agricultural Adjustment Act covers exactly this condition of affairs. Why should we legislate in this bill in addition to what we have already done by the Agritural Adjustment Act?*

Mr. Connally: "The Senator's suggestion is logical, but we are not legislating now with reference to the Agricultural Adjustment Act. We have not got it up now, but we have this other matter up, and as long as we have it up why not do it? Why put it off till tomorrow what we can do today?

Mr. Borah: "I am contending that it has already been done.

Mr. Connally: "But it has not already been done.

Mr. Borah: "Why has it not already been done? The Secretary of Agriculture has the power under the Agricultural Adjustment Act to do what it is proposed here shall be done.

Mr. Connally: "On coconut oil?

Mr. Borah: "Yes.

Mr. Connally: "I do not think coconut oil is mentioned.

* * *

Mr. Connally: "• • • We are going to *bring in* some of this coconut oil even if it does pay a processing tax. There are certain kinds of soap which it is said require coconut oil. But as a general proposition the chemists and experts testify that there is a very considerable interchangeability among all these oils, and that therefore *if the oils were kept out they would use domestic oils to take the place of the coconut oil.*

"Mr. President, in the committee this tax was reduced from 5 cents to 3 cents. It is not a prohibitive tax. It is a moderate tax. *It is simply carrying out the principle of the new system we have adopted.* If we limit our own people, if we tax our own people, if we put *a processing tax on our own people*, why should not the Filipinos themselves bear a small tax now and then in order *to help us to carry out the program for the rehabilitation of American industry and American agriculture?*"

Senator George of the Finance Committee argued (Cong. Rec. Vol. 78, p. 6321):

"• • • But the fact is that we not only have limited [in A. A. A.] the production of the oil producers in the United States but we have put a *processing tax* upon those same producers, and it is obviously fair to put a *processing tax* upon the products of the Philippines. • • •"

Senator Norris agreed that an amendment of A. A. A. might be another way of accomplishing the same end but he said that would require the drafting of another bill (Cong. Rec. Vol. 78, pp. 6381 *et seq.*).

Mr. Reed: "• • • *Why is it any more unfair to the Filipinos to put a processing tax* on one of their agricultural products than *it is unfair to our own farmers to put a processing tax on their products?*

Mr. Norris: "I do not think it would be any more unfair.

• • • •

Mr. Norris: "• • • The Philippine people are not included in the law, however. They are expressly exempted from the law that enables the Secretary of the Treasury to put a processing tax upon the people of the United States.

• • •

Mr. Reed: "*We could extend the A. A. A. by an amendment to cover the Philippines.*

Mr. Norris: "I think probably we could.

Mr. Borah: "*That is really what we are doing in this bill.*

• • • • •

Mr. Norris: "• • • The law exempts the Philippine Islands. That may have been wrong, but it is now the law. They are expressly exempted in the act that empowers the Secretary of Agriculture to levy a processing tax upon the American farmer.

"The Senator says *we ought to levy this tax on the Filipino farmer just the same.* The Senator may be right, but we have not now the law under which we can do that. We might amend the law and do it. In my judgment, it is simply tantamount to saying, 'Your remedy is not right. Let us take another one.' I agree that probably a law might be drawn which would meet the proposition in the way the Senator has suggested, but we are not now confronted with that situation.

• • • •

Mr. Tydings: "I wish to point out the distinction between the effect of *the law upon the Filipino and upon the American farmer.* • • • But may I point out that *the processing tax on the American farmer* is ostensibly a tax levied for the benefit of the American farmer, while *the processing tax levied on the Filipino*

is a tax, not for the benefit of the Filipino but of the American farmer. * * *

* * *

Mr. Borah: "May I suggest to the Senator from Maryland that while the processing tax is, as he says, 'ostensibly' for the benefit of the American farmer, as a practical fact, *it would have exactly the same effect upon the American farmer as upon the Filipino.*

Mr. Tydings: "I think there is much in the Senator's contention, but I simply wanted to point out that the purpose is different.

Mr. Norris: "I think there is something in the contention, but the suggestion that has come from the Senator from Pennsylvania [Sen. Reed] is simply to this effect, as I see it: 'I am opposed to your remedy, I am opposed to doing it that way; *I want to do it some other way*' [*i.e.* by Senator Reed's suggested amendment of A. A. A.]. He may be right about that; *there may be a better way,* but faced as we are with the pending bill, *it would be folly to stop its consideration long enough to frame a statute that would carry it out in the other way.* There would be great difficulty. At the time we framed the statute [A. A. A.] we expressly exempted the Philippine Islands and had in mind as one of the things, the suggestion that has so well been made by the Senator from Maryland. [Moral obligation to the Philippine Islands not to tax their products.]

* * *

Mr. Reed: "The amendment as reported by the Committee on Finance expresses exactly, to my mind, the fair way of accomplishing the desired result. It imposes a *processing tax* of 3 cents a pound directly on *the competing oils.*"

Not only did Congress intend to levy on the foreign oils the same tax on "the first domestic processing" to which competing domestic products had been made subject

under A. A. A. but Congress was well aware that that tax was upon the earliest domestic processing. In debating the tax, Congressman Johnson (Minnesota) said (Cong. Rec. Vol. 78, p. 2611):

> "Section 602 of this act provides that a tax of 5 cents per pound be placed on the processing of all foreign coconut and sesame oils in manufacture or production of an article for sale. This processing tax [is] to apply *to the first use of this oil*, and would also apply on the manufacture of mixtures and combinations of this oil."

Said Congressman Burke of Nebraska (Cong. Rec. Vol. 78, p. 2809):

> "Section 602 of the revenue bill now under consideration imposes a *processing* tax of 5 cents per pound *on the first use of coconut oil* in the manufacture or production of an article for sale. If the preliminary processing is done outside of the United States, then the tax is imposed *on the first processing in the United States* of mixtures or combinations in chief value of coconut oil. What effect can we expect from the imposition of this tax? * * * The effect of this tax will not be to put an embargo on the importation of coconut oil, but it will raise the price so that our domestic fats and oils will be used again in something like the former proportion in the making of soap, margarine, and other products. An increase of 3 or 4 cents a pound on cottonseed oil and the fatty content of hogs and cattle will mean hundreds of millions of dollars additional income to the cotton farmers and the hog and cattle producers of the country."

It is thus impossible to read the debates on this tax without being forced to the conclusion that the specific purpose of Congress in enacting Section 602½ was the *restriction*

of future importations of the foreign oils, particularly coconut oil, so as to compel domestic manufacturers to substitute domestic farm products for the foreign oils and for the further purpose of supplementing the A. A. A. by closing a loophole in that Act; and that with respect to such foreign oils as might be imported into this country, the tax was to attach to the first or earliest use after importation—"the first use in the United States" as defined in said Section 602½. This tax could not be an import duty without a clear violation of the Philippine Independence Act. *But it could be the same kind of processing tax imposed by the A. A. A. upon domestic commodities with which these oils were in competition.* So Congress levied the tax upon "the first domestic processing" of the specified oils, using the same phraseology the same Congress had used a year earlier in providing for a tax upon the actual first domestic processing of certain basic farm products under the A. A. A.

We do not find in the language of Section 602½, nor in the Committee Reports (as we show below), nor in the debates preceding enactment, any reference to "first" in the sense of "first after the effective date"—that is a concept that never entered the Congressional mind. Congress had but one thought, viz., to levy a tax on these foreign oils at the first available point this side of the custom-house.

4. The Congressional Committee Reports.

If we trace the progress of the oil processing tax through the legislative mill from its inception as Section 602 of the Revenue Bill of 1934 to its final enactment as Section 602½, we shall find throughout in the reports (House, Senate and Conference), as well as in the debates the same legislative purpose of protecting the American farmers' products against these oils brought from outside the United States and of restricting their future importation by levying a tax

on the actual first use of such oils within the United States. As introduced in the House, subdivision (a) of Section 602 reads as follows:

> "Sec. 602. Tax on Certain Oils.
>
> "(a) There is hereby imposed upon *the first domestic processing* of coconut oil or sesame oil, or of combinations or mixtures brought into the United States in chief value of either or both such oils, a tax of 5 cents for each pound thereof processed, which shall be paid by the processor. *For the purposes of this section, the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed.*"

It will be noted that the statutory definition of the taxable transaction (*i. e.*, "the first domestic processing,") as originally proposed, remained intact throughout the legislative debates and was enacted into law. In explaining the tax intended to be levied by that Section (then designated as Section 602) House Report No. 704, which accompanied the introduction of the Revenue Bill of 1934, significantly states at page 41:

> "Section 602—Tax on coconut and sesame oils: This section imposes a processing tax on coconut oil and sesame oil. 'Processing' is defined as *the first use* of the oil in the manufacture or production of an article for sale. The tax applies to processing in the United States including the territories, but not the possessions. To prevent avoidance of the tax by the performance of *preliminary processing outside of the United States*, the tax is likewise imposed upon *the first processing in the United States* of mixtures or combinations in chief value of coconut or sesame oil, or of both oils."

It will be noted that the House Ways and Means Committee in Report No. 704 explained unequivocally that "*the tax is * * * imposed upon the first processing in the United States.*" Also, that to prevent avoidance by "preliminary processing *outside of the United States*" the tax is imposed "upon *the first processing in the United States.*" This juxtaposition of language in the Report shows clearly that "first" was used in relation to the *entry* of the oils at the custom-house; the processing taxed was "the first" manufacturing use after entry of the oils. Congress intended to tax and did tax "the first processing in the United States," as the Report states.

After passage in the House of subdivision (a) of Section 602 in the form above quoted the Revenue Bill was sent to the Senate and referred to the Senate Finance Committee. That Committee re-wrote subdivision (a) making the following changes as outlined in Senate Report No. 558 at page 52:

> "The House bill imposes a tax of 5 cents a pound on the first domestic processing of coconut oil, sesame oil, and mixtures brought into the United States in chief value of either or both such oils. The Committee amendment reduces the rate to 3 cents and extends the tax to palm oil, palm-kernel oil, sunflower oil, imported whale oil, imported fish oil, imported marine-animal oil, combinations of the oils enumerated in the section, and mixtures containing substantial quantities of any one or more of such oils. The use of palm oil in the manufacture of tin plate is exempted from the tax."

It will be noted that to further protect the local farmer and dairyman the Senate Finance Committee considerably broadened the statute by adding a number of both *imported* vegetable oils and *imported* fish oils to the taxable items

thereby intending to induce manufacturers to substitute domestic oils and fats for the specified imported oils.

Since, however, there is no substitute for the use of palm oil in the manufacture of tin plate and no protective purpose could be subserved by taxing such use, the Senate Finance Committee specifically exempted that particular use of palm oil—*a clear indication of the protective purpose of the tax.* And it was so explained to the Senate (Cong. Rec. Vol. 78, p. 6318).

On the floor of the Senate, the Norris amendment providing for payment to the Philippines of the tax collected on Philippine coconut oil was adopted.

Section 602 with the above amendments and with other changes not here pertinent was passed by the Senate.

The Revenue Bill was then sent to conference and in Committee the conferees re-wrote said Section 602 dividing it into two parts, as follows: the tax with respect to imported whale oil, imported fish oil and imported marine-animal oil was changed from a *processing* tax to an *import* tax under Section 601(c) of the Revenue Act of 1932 and was enacted as "Section 602" of the Revenue Act of 1934, and the vegetable oil processing tax as such was renumbered as "Section 602½" and was enacted in the form in which it appears in the 1934 Act. (See App., pp. 75, 76 for relevant parts.)

Conference Report No. 1385 showing the changes made by Conferees is set out in the Appendix at page 84. Two points therein are of importance. (a) The Report, in referring to "first domestic processing" explains parenthetically the meaning of that phrase in the following language: "*defined as the first use in commercial manufacture or production.*" (b) With reference to the change of the tax upon imported fish and marine-animal oils from a *processing* tax to an

import tax the Report states that the Conference Amendment "changes the *point of imposition* of *the tax* • • • to the *importation* instead of the first domestic processing." That is to say, there was merely a shift of the tax on these particular oils from the first processing after the entry (the point of imposition under Section 602½) to the entry itself. The vegetable oils remained subject to taxation at the original point of imposition, viz., their "first use in commercial manufacture or production." These two points, we think, lead indubitably to the conclusion that Congress was thinking of the first actual use of the imported oil as the transaction taxable under Section 602½.

Representative Hill of Washington was Chairman of the subcommittee of the House Ways and Means Committee which worked all during the Summer Recess of 1933 in drafting the Revenue Bill of 1934 and was also one of the conferees who composed the differences between the bills adopted by the House and the Senate. While presenting the Conference Report to the House for adoption, he was asked to explain Amendment 153 as agreed to by the conferees and he replied (Cong. Rec. Vol. 78, p. 7833):

> "Well, we put a 3-cent tax on coconut oil—that is, on *the first processing of coconut oil*—that comes from the Philippine Islands and other possessions of the American Government. We put a 5-cent processing tax on coconut oil that comes from countries outside of American possessions and the Philippine Islands."

Again, the word "first" is used in the sense of initial or earliest after arrival in the United States.

In the light of this legislative history it becomes entirely clear, we submit, that the interpretation which the majority of the Court below has given to the section is in fact judicial legislation, which is not in accord with the pur-

pose that Congress had in enacting the section. On the other hand, the construction which petitioner contends for—and only that construction of the tax—gives effect to the legislative intent and purpose of the tax as revealed (a) by all the debates in both Houses of Congress, and (b) by the Committee Reports. That construction—and only that construction—is consistent with the Treasury Department's own interpretation under A. A. A. of the same taxing phrase "the first domestic processing," which interpretation was then in effect and from which Act the statutory language of Section 602½ was derived practically verbatim (App. pp. 77-81). That construction—and only that construction—gives to the words employed in the statutory definition of the taxable event ("the first use in the United States") their usual and normal meaning.

POINT IV.

The amendment of Section 602½ adopted in Section 702(a) of the Revenue Act of 1936 does not show that "it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not," as the Court below held.

The Court below originally found with respect to the 1936 amendment that "since the statute was not reenacted in identical language the rule of congressional confirmation enunciated by *Brewster* v. *Gage*, 280 U. S. 327, 337 and *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273, cannot be applied" (Rec. p. 36). On the Petition for Rehearing a majority of the Court below reversed its position holding that the 1936 Amendment did constitute legislative approval of the regulation (Rec. p. 43). On a

Petition for a Second Rehearing, however, the Court below, while denying the petition, entered an order (Rec. p. 50) striking out *inter alia* the holding in its Opinion on Rehearing that the 1936 Amendment constituted legislative approval of the Treasury regulation, thus reverting to its original opinion that it did not.

However, notwithstanding that the Court below finally held that the 1936 Amendment did not constitute legislative approval of the Treasury regulation, the majority of the Court nevertheless held baldly "that the amendment shows it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not" (Rec. p. 37). There is no reason assigned in the opinion for this holding. Petitioner can only infer that it arose because of the misapprehension of the facts with respect to the legislative history of this amendment evidenced in the Court's opinion.

These are the facts with respect to that amendment. As passed by the House the Revenue Bill of 1936 contained no amendment of Section 602½. The Senate Finance Committee proposed in Section 702(a) of that bill an amendment of the first sentence of Section 602½ of the Revenue Act of 1934. This amendment was adopted by the Senate but the House did not concur, and in conference Section 702(a) was entirely rewritten, substantial changes being made in its revision. For the convenience of the Court we quote in parallel columns Section 702(a) as originally passed by the Senate and as revised by the Conference Committee and subsequently enacted into law.

Section 702(a) As Originally Passed by the Senate

"(a) There is hereby imposed upon the first domestic processing of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts with respect to any of which oils, fatty acids, or salts there has been *no previous first domestic processing* and no import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, a tax of 3 cents per pound to be paid by the processor."

Section 702(a) As Revised by the Conference Committee and Enacted Into Law

"(a) There is hereby imposed upon the first domestic processing of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts, a tax of 3 cents per pound to be paid by the processor, *but the tax under this section shall not apply (1)* with respect to any fatty acid or salt resulting from *a previous first domestic processing taxed under this section* or upon which an import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, or *(2)* with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been *a previous first domestic processing* or upon which an import tax has been paid under such section 601(c)(8)."

It will be noted (1) that fatty acids and salts (newly added to the taxable articles) and mixtures and combinations were all treated alike under the Senate amendment; but (2) that under the revised amendment as finally adopted two exemption clauses were inserted resulting in a different treatment of fatty acids and salts, on the one hand, and of combinations and mixtures, on the other, *i. e.*, it was provided that the tax "shall not apply

(1) with respect to any fatty acid or salt resulting from a *previous first domestic processing taxed under this section* • • • or

(2) with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been a *previous first domestic processing* • • •"

In commenting on this revision the majority opinion of the Court below says (Rec. p. 36):

> "• • • the bill was rewritten in committee *and the words 'taxed under this section' was added to the phrase 'no previous domestic processing.'*"

This is inaccurate not only in its description of what the Conference Committee did, but even more importantly in its implication that the committee did no more than is described. The statement in the opinion that "the words 'taxed under this section' was added to the phrase 'no previous domestic processing'" is clearly incorrect because the amendment as "rewritten in committee" contains no clause reading "*no* previous domestic processing taxed under this section." That error is crucial. Instead of adding words to the phrase "no previous domestic processing" the Conference Committee eliminated that phrase altogether and substituted therefor two separate and differently worded exemption clauses which show conclusively that Congress

recognized that there were "first domestic processings" which were taxable, *i. e.*, those occurring after May 10, 1934, and "first domestic processings" which were not taxable, which could only be "first domestic processings" occurring before that date. If there had been a mere addition of the words "taxed under this section" to the phrase "no previous domestic processing" there would then have been only *one* limiting clause in the 1936 amendment *applicable alike* to fatty acids, salts, combinations and mixtures. When "the bill was rewritten in committee," however, instead of treating all those articles alike by levying no tax on any of them where there has been a "previous first domestic processing," the revised amendment provided for *two* specific and different exemption clauses, thus separating the fatty acids and salts (new articles added by the amendment) into one group covered by exemption clause (1) and the combinations and mixtures into a second group covered by exemption clause (2). The very fact that the Conference Committee in the revision saw fit to provide for two exemption clauses shows that a differentiation between the two separate groups was intended. The differentiation actually effected was this. Under clause (1) a fatty acid or salt was exempted when "resulting from a previous first domestic processing *taxed under this section*"[1] while under

[1] Fatty acids "result from" the "splitting" of an oil into a fatty acid and glycerine. A salt of a fatty acid, such as soap, usually "results from" the simultaneous splitting of an oil and saponification with a caustic of the fatty acid produced by the splitting. Such a domestic splitting of an oil or simultaneous splitting and saponification might have occurred before May 10, 1934, in which event the splitting, "resulting" in a fatty acid, or the simultaneous splitting and saponification, "resulting" in a salt, *i. e.*, soap, would not have been taxed. Or such a domestic splitting of an oil or simultaneous splitting and saponification might have occurred after May 10, 1934, in which event the splitting "resulting" in a fatty acid, or the simultaneous splitting and saponification "resulting" in a salt, would have been taxed.

clause (2) a combination or mixture was exempted when with respect to the taxable content thereof "there has been a previous first domestic processing" (which might or might not have been taxed dependent on whether such processing had occurred before or after the effective date of the tax).

The majority of the Court below have erroneously referred in the original opinion (Rec. p. 36) to petitioner's contention with respect to the amendment as being based merely on the addition of the words "taxed under this section" in a single clause. Actually petitioner's contention is based and was based in the Court below on the fact that the Conference Committee wrote into the amendment two different clauses, one of them, as stated above, creating an exemption of mixtures and combinations conditioned upon a "previous first domestic processing" and the other creating an exemption of fatty acids and salts conditioned upon their "resulting from a previous first domestic processing *taxed under this section.*"

On the incorrect premise that the Conference Committee added the phrase "taxed under this section" to the phrase "no previous domestic processing" the majority of the Court below reached the conclusion that (Rec. p. 37):

> "Congress intended to tax oils of the designated classes or combinations *which had not been previously taxed under Section 602½(a)* * * *. In short we think that the amendment shows it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not."

This is not the intent expressed in the amendment. As to fatty acids and salts, to be sure, the intent expressed in the amendment is to tax them except when they have resulted from a "previous first domestic processing *taxed under this section*"; but as to combinations and mixtures, the

intent expressed in the amendment is to tax them except when "there has been a previous first domestic processing" (whether taxed or not) of the taxable ingredients. The amendment contemplates that some "first domestic processings" were untaxed and only if "first" means earliest, could there have been an untaxed first domestic processing.

This conclusion of the Court below fails to give any effect whatsoever to the fact of the two separate exemption clauses with a clear-cut distinction between the two exemptions. This distinction in the two exemption clauses (between "a previous first domestic processing *taxed under this section*" and "a previous first domestic processing") was deliberate. It is a distinction made by an amendment carefully drawn by the Conference Committee. It is a fundamental distinction giving meaning and purpose to the creation of the two exemption clauses. If Congress did not intend some differentiation between the two clauses, why the limiting phrase—"taxed under this section"—in the one and not in the other? If this limitation was intended to apply indiscriminately to both exemption clauses, why did Congress deliberately create two exemption clauses, one with and one without the limitation? One may not read this limitation out of the first exemption clause or read it into the second exemption clause. One must construe the amendment as enacted—without deletion or addition.

The limiting phrase "taxed under this section" cannot be brushed aside as mere surplusage. Some effect must be given to it. But it has no effect and there is no conceivable reason for its insertion if "the first domestic processing" means "the first domestic processing after the effective date of the Act." For then every "first domestic processing" would be taxable; there could then be no such thing as an untaxed "first domestic processing." If, however, "first" be taken in its ordinary sense of "earliest" there would be

"first domestic processings" which occurred after the effective date of the tax and were taxed, and "first domestic processings" which occurred before the effective date of the tax and were untaxed. There would be a reason for use of the phrase "taxed under this section."

In the light of the history of the 1936 Amendment and the express language of the two exemption clauses, we submit that there is no reasonable basis for the Court below ascribing to Congress an intent wholly at variance with the language of that amendment. There is nothing in the Conference Committee Report on the amendment to substantiate the Court's view, as that report simply sets out in *haec verba* the text of the amendment as revised by the Committee (House Conf. Rep. #3068). Nor is there anything in the debates to substantiate the Court's view, the amendment as revised by the Conferees having been adopted by the House and Senate without discussion.

It is not incumbent upon the petitioner to give a reason for the distinction between the two exemption clauses of the 1936 Amendment. It is entitled to rely upon the clauses as enacted. However, there are sound reasons for the distinction. What Congress actually did in the 1936 Amendment was to carry forward from the 1934 Act to the 1936 Amendment, without change, the condition prescribed under the 1934 Act for the taxation of combinations or mixtures, viz., combinations and mixtures were not to be taxed if there had been a "previous first domestic processing" of the taxable content thereof. Congress did not at that late date change the condition under which combinations and mixtures had been taxable for more than two years. But with respect to fatty acids and salts, *which were newly added to the taxable articles* by the amendment, the exemption was more narrowly conditioned on their "resulting from a previous first domestic processing *taxed under this section.*"

If Congress in enacting the 1936 Amendment had intended to limit the exemption of combinations or mixtures to those instances where "a previous first domestic processing" had been "taxed under this section," Congress would have inserted the same limitation in clause (2) as it did in clause (1). That such limitation was not so inserted shows that Congress intended that the exemption of combinations or mixtures be continued as it existed under the 1934 Act.

In those cases in which the Courts have found in the reenactment of a former statuory provision an intent to approve the prior administrative interpretation of that provision, the intent so found is merely an imputed and not an expressed intent. As is explained above (*supra*, p. 51) the Court below first held that the 1936 Amendment did not constitute such approval, then that it did, and finally once again that it did not. Certainly the Court was correct in not imputing to Congress in this instance an intent to approve the departmental regulation here in question when Congress adopted specific language recognizing the distinction between taxed and untaxed "first domestic processings" above pointed out?

Looking at the matter realistically, we question whether Congress in enacting the 1936 Amendment concerned itself at all with the regulation in question, because that regulation affected only domestically processed oils on hand on May 10, 1934 and little of those oils could have been left when the amendment was passed two years and three months later. One thing, however, seems to us certain—if Congress did concern itself with the Treasury regulation its concern was not to ratify the regulation. If Congress had intended to approve the regulation, would it have deliberately enacted statutory language which is inexplicable if the regulation is right?

POINT V.

The rule of prospective operation of tax statutes does not require or justify the construction that first means "first after the effective date of the tax."

The majority of the Court below relied for its decision upon "two plain sign-posts," (1) "First * * * a statute is presumed to operate on future acts unless the contrary intent is declared," citing *Hassett* v. *Welch*, 303 U. S. 303, 314.

We do not quarrel with the Court's statement of the rule that "a statute is presumed to operate on future acts unless the contrary intent is declared." That is a proper statement of the rule. That is the very principle upon which the petitioner relies in this case. The tax herein sought to be recovered was illegally collected because "the first domestic processing" of the oils herein occurred prior to the effective date of the tax and under the rule the tax may not be retroactively applied.

All that the rule of prospective operation of statutes means is that a statute is not to be retroactively applied in the absence of a clear expression to the contrary. With specific reference to the statute in question the rule means that if "the first domestic processing" takes place after the effective date of the tax, it is taxed; if it occurs before that date, it is not taxed. In *Hassett* v. *Welch*, *supra*, where the Court was construing an amendment to the Revenue Act of 1926 relative to the estate tax imposed upon the corpus of certain trusts, the Government contended that the amend-

ment was applicable to such trusts created prior to the enactment thereof. But this Court held (p. 307):

> "We hold that the statutes are prospective in their operation and do not impose a tax in respect of past irrevocable transfers with reservation of a life interest."

The rule does not justify the enlargement of the statutory definition of the taxable event beyond the plain import of its words. There can be but one "the first domestic processing." The rule of prospective operation cannot convert a second, third, fourth or fifth domestic processing into "the first domestic processing."

The rule of prospective operation of statutes has been uniformly applied by this Court as a principle of limitation—not enlargement; of exclusion—not inclusion. *Shwab* v. *Doyle*, 258 U. S. 529; *Levy* v. *Wardell*, 258 U. S. 542; *Lewellyn* v. *Frick*, 268 U. S. 238; *Bingham* v. *U. S.*, 296 U. S. 211; *Hassett* v. *Welch*, *supra*.

The Court below does not cite any precedent that sustains its use of the rule for construing "first" in a sense other than its usual and normal sense. The statute is to be applied prospectively, but in doing so, the Court must confine itself to the statute as written by Congress without additions or interpolations of any kind.

Finally, the principle of prospective operation of statutes was likewise applicable to the tax upon "the first domestic processing" of basic agricultural commodities under A. A. A. The Government did not find that this principle required or justified that "first" be there construed as first after the effective date of the Act. No more does the principle require or justify that "first" be here construed as meaning the first after the effective date of the Act.

POINT VI.

The further grounds upon which the Court below in the cases at bar and the grounds upon which the Circuit Court of Appeals for the Second Circuit in the *Loose-Wiles Biscuit Company* case rested their respective decisions do not sustain the conclusions reached.

A. Further grounds of the opinion below.

The second of the two "plain sign posts" which guided the Court below is introduced in the paragraph beginning: "Second, Treasury Regulations 48 * * * construe the phrase 'first domestic processing' as meaning the first use in the United States after the effective date of the Act" (Rec. p. 35).

We have shown that the interpolation by those regulations of the words "on and after the effective date of the Act" was administrative legislation broadening the scope of the statute and was inconsistent with the legislative history and purpose of Section 602½.

In discussing the "second sign post" the Court below attributes this contention to the Government:

> "* * * The defendant points out that these regulations were promulgated by the Treasury Department pursuant to the provisions of Section 1101 of the Revenue Act of 1926. See 44 Stat. 111. Sec. 602½(f) of the Revenue Act of 1934, 48 Stat. 764, provides that all provisions of Section 600 of the Revenue Act of 1926, 44 Stat. 93, not inconsistent with the provisions of Sec. 602½ of the Revenue Act of 1934 shall be applicable in respect to the taxes imposed by Section 602½. In effect, therefore, contends the defendant, Treasury Regulations 48 were made applicable to Section 602½ of the Revenue Act of 1934."

This contention is cited with seeming approval; there is no other apparent reason for citing it. The fact is that the Government did not and could not make any such contention; the regulations were not in existence when Section 602½ was passed and could not have been made applicable by that section.[1]

In its original opinion, as modified on rehearing, the Court held that Section 402 of the Revenue Act of 1935, 49 Stat. 1026, imposing a compensatory tax upon the importation of articles produced from the oils named in Section 602½, "furnished some evidence that Congress *was not dissatisfied* with the Treasury Department's interpretation" but deleted that by a later order (Rec. p. 50), thus abandoning any inferences from Section 402 of the Revenue Act of 1935. And of course the enactment of a compensatory duty on articles made from these oils would not give occasion for any consideration by Congress of the regulation here in question.

B. Grounds of opinion in *Loose-Wiles Biscuit Company* case.

In *Loose-Wiles Biscuit Company* v. *Rasquin*, 95 F. (2d) 438, the Court took the view that the Treasury Regulation was "a reasonable construction of the statutory language," and held the enactment of the 1936 Amendment "leaving the words 'first domestic processing' unchanged, does, we think, show congressional approval of the administrative inter-

[1] The Court below was confused as to the actual provisions of Section 602½. The opinion states that Section 602½(f) provides that "*All provisions of Section 600* of the Revenue Act of 1926 * * * shall be applicable in respect of the taxes imposed by Section 602½." Section 602½(f) actually provides that "All provisions of law * * * *applicable in respect of taxes imposed by Section 600* of the Revenue Act of 1926, shall * * * be applicable in respect of the taxes imposed by this section."

pretation of that phrase in the statute so persuasively that we should give it effect" (p. 440).

In reaching these conclusions, however, the Court was not advised by the taxpayer or the Government of any of the facts of the legislative history of Section 602½ including the following, nor is any of them referred to in its opinion: (a) that the phrase "the first domestic processing" was derived verbatim from the A. A. A. and had there been construed consistently by the Treasury Department as meaning the first in point of time; (b) that Section 602½ was enacted to supplement and further effectuate the purposes of the A. A. A.; (c) that the debates show that Congress intended in Section 602½ to levy upon the foreign oils *the same processing tax* which the same Congress had previously authorized upon American farm products under A. A. A., and (d) that, consistent with that intent, Congress in effect adopted the Treasury Department's construction of "the first domestic processing" under A. A. A. when in Section 602½ Congress defined that phrase to mean "the first use in the United States in the manufacture or production of an article intended for sale."

In upholding the Treasury definition of "first domestic processing" the Court ignored the definition in the statute. It is not referred to in the opinion. It took no note of the double change which the Treasury definition made in the statutory definition—the deletion from the clause limiting the words "the first" of the phrase "in the manufacture or production of an article intended for sale" and the substitution therefor of the phrase "on or after the effective date of the Act" (*supra*, p. 10).

Unadvised with respect to any of these substantial matters the Court considered, *in vacuo* as it were, whether there were in the wording of the original Act any internal

indications that the Treasury Regulations "were a reasonable construction of the statutory language" and found that there were indications that it was reasonable though they were not "relied on for more than that" by the Court.

The first of the indications was this. The oil involved in that suit was coconut oil which had been refined in this country before May 10, 1934 in the production of refined oil for sale, and had been sold by the refiner to the Loose-Wiles Biscuit Company which after that date again used the oil in the manufacture of an article intended for sale, viz., as shortening in the manufacture of its bakery products. Referring to that oil the Court said:

> "• • • If any previous processing of it in this country which left it still coconut oil was to be treated as the first domestic processing to give it such a status as not to be capable of being subjected to a taxable processing as coconut oil, we think Congress would have said so, as it did in the same section with regard to mixtures."

The provision of Section 602½ with respect to mixtures to which the Court refers, is that the tax attaches to the first domestic processing of mixtures "where there has been no previous first domestic processing" of the contained oil.

What the Court is here saying is that the processing by Loose-Wiles Biscuit Company after May 10, 1934 is taxable because if Congress had intended that the "previous processing" of the oil by the refiner prior to May 10, 1934 which still left it coconut oil "was to be treated as the first domestic processing to give it such a status as not to be capable of being subjected to a taxable processing as coconut oil, we think Congress would have said so, as it did • • • with regard to mixtures." This statement can only be true if the Court *assumes* at the outset that "first" means first after May 10, 1934; because factually the processing by Loose-Wiles is the actual second domestic processing of the

oil; and such actual second domestic processing can only become "the first" in the sense that it is *the first* domestic processing of the oil *after May 10, 1934.* The Court is thus assuming the point it seeks to prove. Thus it is only if one assumes that "first" means first after May 10, 1934, that there would be any occasion to write into the statute an express provision exempting such second processing. If we apply the statutory definition of "first domestic processing," viz., "*the first* [earliest] use in the United States *in the manufacture or production* of an article intended for sale," it is clear that the processing by the refiner prior to May 10, 1934 was the earliest use in manufacture or production and accordingly was "the first domestic processing" of the oil. The processing by Loose-Wiles was the second domestic processing and was not taxable because the statute taxes only the *first* such processing. If we take the statutory definition there is no occasion for Congress to write into the statute an express provision exempting such second processing.

In other words, one can deduce from the absence of such an exemption from Section 602½ the conclusion that unmixed oils domestically processed before and after May 10, 1934 are taxable upon the later processing, only if one assumes to begin with that "first" means "first after the effective date of the Act," and that therefore some sort of an express exemption is necessary to give the processing after May 10 immunity.

But with respect to mixtures, the situation was different. The statute taxes "the first domestic processing" of a mixture, to use the Court's language, "only when in respect to any of the oils in the mixture there has been 'no previous first domestic processing.'" There might be a "first do-

mestic processing" of an unmixed oil followed by a "first domestic processing" of a mixture into which the oil had in the meantime been introduced. Accordingly, it made sense to provide that the tax should be levied on "the first domestic processing" of a mixture provided there has been no "previous first domestic processing" of the contained oil. But to say, if that is what the Court meant, that "the first domestic processing" of an unmixed oil is to be taxed provided there has been "no previous first domestic processing" of that oil would be meaningless. There can be but one "first domestic processing" of an unmixed oil—a second processing of that same oil could not be the first.

The Court states as another ground for thinking that the Treasury interpretation is reasonable that taxpayer's interpretation makes the phrase "previous first" redundant. We see no significant redundancy but only careful draftsmanship in the use of both words, however the language in question be construed; and we have already shown that the Treasury construction produces in the first exemption clause of the 1936 Amendment a clear redundancy for which there would be no explanation. That clause exempts fatty acids and salts "resulting from a previous first domestic processing *taxed under this section.*" Fatty acids and salts were newly added to the taxable articles by the 1936 Amendment. If "first" means "first after the effective date of the Act," "first domestic processing" would have to mean, with respect to fatty acids and salts, first after the effective date of the 1936 Amendment; and *every* first domestic processing of a fatty acid or a salt would thus be a processing "taxed under this section," and the phrase "previous first domestic processing *taxed under this section,*" under that construction, would be clearly redundant.

The final reason stated in the opinion for viewing the Treasury Regulation as reasonable was this. The Court held that the purpose of the provision that mixtures were to be taxed only "where there has been no previous first domestic processing of the contained oil" was to avoid double taxation; and that purpose was effectuated by construing "first" as meaning "first after the effective date of the Act." But the taxpayer's construction likewise effectuates that purpose. And opposed to the Court's deduction are all the substantial considerations which have been presented in this brief.

The Loose-Wiles opinion continues (p. 440):

> "• • • We do not, however, rely on that for more than to show that the Treasury regulations promulgated under the statute were a reasonable construction of the statutory language. But that, coupled with the fact that Congress amended section 602½ and re-enacted it as amended in section 702 of the Revenue Act of 1936, leaving the words 'first domestic processing' unchanged, does, we think, show congressional approval of the administrative interpretation of that phrase in the statute so persuasively that we should give it effect. Accordingly, we feel bound to hold the regulations valid."

The taxpayer in that case failed to present to the Court any analysis of the 1936 Amendment, failed to direct the Court's attention to the diverse language of the two exemption clauses, failed to point out the redundancy in the first exemption clause if the construction put upon the section by that Court is right, and failed to point out that the express language of the amendment (recognizing that there would be taxed and untaxed "previous first domestic processings") is wholly inconsistent with any idea of legislative approval of the Treasury Regulation, as we have shown above (*supra*, pp. 54-59).

As has been stated (*supra*, pp. 51-52), the Court below in the instant cases expressly rejected the contention that the 1936 Amendment showed approval by Congress of the Treasury Regulation.

POINT VII.

If there be any doubt as to the proper construction of Section 602½, the section must of course be strictly construed against the Government and all doubts resolved in favor of the taxpayer.

This principle is so well settled that we hesitate to cite cases to this Court. We have, however, collected some of the decisions which are particularly pertinent, in a footnote,[1] and will refer in the body of the brief to only one decision of this Court.[2]

It is noteworthy that all the Courts which have held with the Government on the question presented in the instant cases have expressed or indicated doubts, while all the Courts which have held for the taxpayer indicated no doubts whatever.

In the concluding paragraph of the opinion of the Court below it is stated (Rec. p. 37): "The question posed for our determination *is a difficult one*," and it is apparent from the shifts and changes in the opinions of the majority of the Court below that the question was "difficult" because the correct answer was doubtful.

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[1] *Gould* v. *Gould*, 245 U. S. 151, 153; *United States* v. *Merriam*, 263 U. S. 179, 187, 188; *Crooks* v. *Harrelson*, 282 U. S. 55, 61; *White* v. *Aronson*, 302 U. S. 16, 20; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508.

[2] *Miller* v. *Standard Nut Margarine Co.*, *infra*, p. 71.

The changes in the several opinions of the Court below to which we have called attention (*supra*, pp. 51, 52, 63) evidence more doubt than certainty.

In the other two cases in which the Government's contention has been sustained, viz., *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. (2d) 438 and *Tasty Baking Company* v. *United States*, 38 F. Supp. 844 (Ct. Cl. 1941), the Courts expressed or indicated doubts. In the *Loose-Wiles* case, *supra*, the Court said (p. 440):

> "* * * *Apart from the regulations*, we think the language of the statute *does leave it doubtful* whether Congress intended to tax a processing of the oils within the United States, which, though a first processing in point of time after the effective date of the statute, was not also the first in point of fact which had taken place in the country."

Likewise, in the majority opinion in the *Tasty Baking Co.* case, *supra*, Judge JONES said (p. 847):

> "If this issue were before us as a matter of first impression we *would have doubt* whether the Congress intended to tax oils in stocks that had previously been processed in the United States."

And again he said that the intention of Congress "is not *altogether clear, especially in the light of the Treasury Regulations* and the subsequent implied approval of the Congress" (p. 847).

On the other hand, the opinions in the cases which have sustained the taxpayers' contention, viz., *Durkee Famous Foods, Inc.* v. *Harrison*, *supra*, *Cincinnati Soap Company* v. *United States*, 22 F. Supp. 141 (D. C. Ohio—1938) and *Armour & Company* v. *Harrison* (D. C. Ill.—1937 C. C. H. Fed. Tax Service Vol. 4, Par. 9507) not officially reported, appeal dismissed, 95 F. (2d) 993, the Courts have declined to

let the promulgation of the Treasury Regulation create a doubt as to the proper interpretation of the statute and have held that the language of the statute on its face was clear and unambiguous.

Judge MARIS, for example to whom the phrase "first domestic processing" seemed "to be wholly free from ambiguity" (Rec. p. 44), concluded his dissenting opinion as follows (Rec. p. 46):

> "Consequently I think that the regulation is invalid and that its application violates the settled rule, to which, however, the courts too frequently pay only lip service, that ambiguities in a revenue statute must be construed strictly against the Government and that doubts therein must be resolved in favor of the taxpayer."

It seems to us that there is no room for doubt that "first" means "first" and not "first after the effective date of tax." If independently of the regulation one should ask the question when did the oils involved in these suits receive their first domestic processing, there could be but one answer —before May 10, 1934.

It is the regulation interpolating the words "on and after the effective date of the Act" which generated the doubts entertained by the Courts which have decided in favor of the Government, the doubt in each case *being as to the correctness of the regulation.* Such doubts are to be resolved in favor of the taxpayer.

A case in point, in which the facts are very similar to those of the instant cases, is *Miller* v. *Standard Nut Margarine Company,* 284 U. S. 498. In that case likewise the Commissioner endeavored to revise or amend a statute by issuing regulations extending its scope. The question was whether plaintiff's product came within the statutory definition of oleomargarine and was subject to the

tax of 10 cents per pound. The statute was amended in 1931 to include additional substances and the statutory definition of oleomargarine, as amended, included among the added substances "vegetable-oil annotto." The Commissioner issued regulations in which the quoted phrase appeared as "vegetable oil, annotto" thereby in effect extending the statutory definition of oleomargarine to include plaintiff's product. The Court held that the regulation was invalid, saying (p. 508):

> "Regulations promulgated under the Act omit the hyphen and add a comma thus making the phrase to read 'vegetable oil, annotto.' The Commissioner's determination that respondent's product is oleomargarine necessarily was based on that version. It is elementary that *tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the Government and in favor of taxpayers.*"

In the cases at bar the Commissioner's attempted revision of the statutory language with the purpose of broadening the scope of the tax takes the form not of a change in the punctuation of the statutory language, but of an interpolation into the statutory definition of words not written there by Congress, viz., "on and after the effective date of the Act." Petitioner submits that the principle involved here is precisely the same as in the foregoing case and the decision in that case should have been controlling in the instant litigation. The majority of the Court in the *Durkee Famous Foods, Inc.*, case, *supra*, and Judge DRUFFEL in the *Cincinnati Soap Company* case, *supra*, specifically so held.

To petitioner the meaning of the phrase in controversy is not susceptible of any doubt. There is nothing in any of the other language employed in the statute that raises any

such doubt. There is nothing in the purpose and history of the statute that raises any such doubt. All of these substantiate petitioner's contention.

Conclusion.

It is respectfully submitted that the judgments of the United States Circuit Court of Appeals for the Third Circuit and of the United States District Court for the District of Delaware should be reversed and the cause should be ordered to be remanded to the United States District Court for the District of Delaware with instructions to enter a judgment in favor of the petitioner in accordance with the Stipulations of Facts (Par. 27, Rec. p. 15, and Par. 18, Rec. p. 24).

Respectfully submitted,

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APPENDIX.

I.—Revenue Act of 1934.

(Ch. 277, 48 Stat. 762, 763, 26 U. S. C. A. (1934 Ed.) Secs. 999a and 999.)

"Sec. 602. Tax on Certain Oils.

Section 601 (c) of the Revenue Act of 1932 is amended by adding at the end thereof a new paragraph as follows:

'(8) Whale oil (except sperm oil), fish oil (except cod oil, cod-liver oil, and halibut-liver oil), marine animal oil, and any combination or mixture containing a substantial quantity of any one or more of such oils, 3 cents per pound. The tax on the articles described in this paragraph shall apply only with respect to the importation of such articles *after the date of the enactment of the Revenue Act of 1934*,[1] and shall not be subject to the provisions of subsection (b) (4) of this section (prohibiting drawback) or section 629 (relating to expiration of taxes).'"

"Sec. 602½. Processing Tax on Certain Oils.

(a) There is hereby imposed upon *the first domestic processing* of coconut oil, sesame oil, palm oil, palm kernal (sic) oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sentence) a tax of 2 cents per pound, to be paid by the processor, upon the first domestic processing of coconut oil or of any combination or mixture containing a substantial quantity of coconut oil with respect to which oil there has been no revious first domestic

[1] Where italics are used, the emphasis is ours unless otherwise noted.

processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such coconut oil (whether or not contained in such a combination or mixture), (A) is wholly the production of the Philippine Islands or any other possession of the United States, or (B) was produced wholly from materials the growth or production of the Philippine Islands or any other possession of the United States, or (C) was brought into the United States on or before the 30th day *after the date of the enactment of this Act* or produced from materials brought into the United States on or before the 30th day *after the date of enactment of this Act*, or (D) was purchased under a bona fide contract entered into prior to April 26, 1934, or produced from materials purchased under a bona fide contract entered into prior to April 26, 1934. All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. *For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale*, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate.

* * *

Appendix

II.—Derivation of Language Used in Section 602½.

We quote below in parallel columns corresponding provisions of the Agricultural Adjustment Act, approved May 12, 1933 and Section 602½ approved May 10, 1934:

Agricultural Adjustment Act	Section 602½
"Sec. 9. * * * The processing tax shall be levied, assessed, and collected upon *the first domestic processing* of the commodity, whether of domestic production or imported, and shall be *paid by the processor.* * * *."	"(a) There is hereby imposed upon *the first domestic processing* of coconut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be *paid by the processor* * * *."
"Sec. 15 (e) During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or in chief value from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession	(Section 602½ did not contain any provision for a compensating tax upon imports similar to the compensating tax of Section 15(e) printed opposite this paragraph. However, the idea for holding the tax upon Philippine coconut oil in a separate fund and paying the same over to the Philippine Islands undoubtedly came from the underscored portion of Section 15(e) of the A. A. A. as

of the United States to which this title does not apply, a *compensating tax* equal to the amount of the processing tax in effect with respect to domestic processing at the time of importation: *Provided, That all taxes collected under this subsection upon articles coming from the possessions of the United States to which this title does not apply shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund and paid into the Treasury of the said possessions, respectively* • • •"

(Sec. 19(b) of the A. A. A. (*infra*, p. 81) by reference incorporates in A. A. A. the provisions of Sec. 626 of the Revenue Act of 1932, subdivisions (a) and (b) of which read as follows:)

"(a) Every person liable for any tax imposed by this title other than taxes on importation (except tax under section 615, relating to tax on soft drinks) shall make monthly returns under oath in duplicate and pay the taxes imposed by this title to the collector for the district in which is located his prin-

shown from the comparison below.)

"(a) • • • All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands • • •"

"(b) Each processor required to pay the tax imposed by this section shall make monthly returns under oath in duplicate and pay the tax to the collector of internal revenue for the district in which is located his principal place of business, or if he has no principal place of business in the United States, then to

cipal place of business or, if he has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

"(b) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid."

"Sec. 17. (a) Upon the exportation to any foreign country (including the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam) of any product with respect to which a tax has been paid under this title, or of any product processed wholly or in chief value from a commodity with respect to which a tax has been paid under the collector of internal revenue at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum per month from the time the tax became due until paid."

"(d) Upon the exportation to any foreign country or to a possession of the United States of any article wholly or in chief value of an article with respect to the processing of which a tax has been paid under this section, the exporter thereof shall be entitled to a refund of the amount of such tax. Upon the giving of bond satisfactory to the Secretary for

this title, the exporter thereof shall be entitled at the time of exportation to a refund of the amount of such tax.

"(b) Upon the giving of bond satisfactory to the Secretary of the Treasury for the faithful observance of the provisions of this title requiring the payment of taxes, any person shall be entitled, without payment of the tax, to process for such exportation any commodity with respect to which a tax is imposed by this title, or to hold for such exportation any article processed wholly or in chief value therefrom."

"Sec. 18. (a) If (1) any processor, jobber, or wholesaler has, prior to the date a tax with respect to any commodity is first imposed under this title, made a bona fide contract of sale for delivery on or after such date, of any article processed wholly or in chief value from such commodity, and if (2) such contract does not permit the addition to the amount to be paid thereunder of the whole faithful observance of the provisions of this section requiring the payment of taxes, any person shall be entitled, without payment of the tax, to process for such exportation any article with respect to which a tax is imposed by this section."

"(e) If (1) any person has, prior to January 26, 1934, made a bona fide contract for the sale on or after the effective date of this section of any article wholly or in chief value of an article with respect to which a tax is imposed by this section or of any article with respect to which a tax is imposed by this subsection, and if (2) such contract does not permit the addition to the

of such tax, then (unless the contract prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price.

"(b) Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated and shall be collected and paid to the United States by the vendor in the same manner as other taxes under this title. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner of Internal Revenue who shall cause collections of such taxes to be made from the vendee."

"Sec. 19. * * * (b) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, insofar as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: * * *"

amount to be paid thereunder of the whole of such tax, then (unless the contract expressly prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price. Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated and shall be returned and paid to the United States by the vendor in the same manner as other taxes under this secton. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner, who shall cause collection of such taxes to be made from the vendee."

"(f) All provisions of law (including penalties) applicable in respect of taxes imposed by section 600 of the Revenue Act of 1926, shall, insofar as applicable and not inconsistent with this section, be applicable in respect of the taxes imposed by this section."

III.—Additional Excerpts from the Congressional Debates on Section 602½ of the Revenue Act of 1934.

"The amount of this tax is equivalent to 200 percent on the current market price of coconut oil. No industry could bear that tax and survive, and it is very clear, from their statements before the House, that the proponents of this tax are not expecting revenue but are seeking only to prevent the importation of coconut oil. • • •

"Many members of this House have taken advantage of this debate to express themselves more or less vehemently *in favor of the total exclusion of coconut oil and are in favor of this tax as a means to that end.*" (Congresswoman Kahn—Cong. Rec. Vol. 78, p. 2785.)

"As every member knows, practically the entire amount of copra and coconut oil used in Continental United States comes from the Philippine Islands and the imposition of this so-called 'excise tax' is nothing more or less than the imposition of a *prohibitive tariff* on a people under the American flag. • • •

"Without equivocation, Mr. Chairman, I assert this excise tax to be nothing more or less than a prohibitive tariff, and I denounce it as such, for its competitive field with American commodities is so limited as to be utterly negligible. • • •" (Congressman Welch—Cong. Rec. Vol. 78, p. 2793.)

"• • • It is not understood why, *in this legislation*, we should seek to penalize the Philippines *by restricting their imports to this country in oils* while at the same time the administration is seeking to augment not only the exports of the Philippines, but of Cuba, as well, in sugar, which product is directly competitive to sugar production in this country." (Congressman Hoeppel—Cong. Rec. Vol. 78, p. 2930.)

"• • • Thus in the very law that launched the present agricultural program, *which proponents of the coconut-oil tax contend cannot succeed without restrictions on importations of that product* is found a specific protection for Philippine commodities." (Congresswoman Norton—Cong. Rec. Vol. 78, p. 3007.)

"I have been approached by people from my own state who were over here by the dozens saying they wanted this tax imposed *in order to keep Filipino products out of this country.* That is all that is behind it. There is not an ounce of revenue in it." (Senator Tydings—Cong. Rec. Vol. 78, p. 6312.)

"I am sure there are a good many Senators here who want to abide by the independence act, but, at the same time, *they desire to put a fair limitation on imports.*" (Senator Harrison—Cong. Rec, Vol. 78, p. 6314.)

"I believe some of this oil will be excluded, because the Senator knows that *whenever we put a duty* on any article there is a certain deterrent effect, and *to some extent it will lessen imports.*" (Senator Connally—Cong. Rec. Vol. 78, p. 6316.)

"The processing tax which was inserted in the bill by the House provided for a tax of 5 cents a pound upon coconut oil and copra. Its effect, if unmodified, would be *the same as though we had levied a tariff tax.*" (Senator Norris—Cong. Rec. Vol. 78, p. 6380.)

"This tax is intended on its face to be a prohibitive tax. It is not intended to raise revenue. It is not included in this bill for the purpose of raising

revenue. *It is for the purpose of establishing an embargo;* * * *." (Senator Clark—Cong. Rec. Vol. 78, p. 6393.)

"I make the motion because, to my mind, the inclusion in a so-called 'revenue bill' of provisions which are not intended to raise revenue, *but contemplate an embargo,* is a most dishonest and most vicious system of legislating." (Senator Clark—Cong. Rec. Vol. 78, p. 6395.)

"*The purpose of this action is to exclude Filipino products,* not to raise revenue. * * *

"Even so, if this were a revenue tax, we might justify it on some vague ground; but this is a tariff tax and nothing else, *put on to exclude an article which we do not produce in the United States.*" (Senator Tydings—Cong. Rec. Vol. 78, p. 7976.)

IV.—House Conference Report No. 1385, Revenue Act of 1934, explains the changes made by the Conferees in Sections 602 and 602½ as follows (p. 29):

"Amendment no. 153: The House bill imposed a tax of 5 cents per pound on the first domestic processing (*defined as the first use in commercial manufacture or production*) of coconut oil, sesame oil, or combinations or mixtures brought into the United States in chief value of either or both such oils.

"This amendment reduces the rate of tax to 3 cents per pound. It also adds palm oil, palm-kernel oil, sunflower oil, perilla oil, imported whale oil, imported fish oil (except cod and cod-liver oil), and imported marine-animal oil to the taxable oils and taxes

combinations of the oils enumerated in the section and mixtures containing substantial quantities of any one or more of such oils. Palm oil used in the manufacture of tin plate is exempted from the tax. All taxes collected under the subsection on products of the Philippines are to be held as a separate fund and paid into the treasury of the Philippines, but this provision is to be inoperative if the Philippine Government by any law provides for any subsidy to be paid to producers of copra, coconut oil or allied products.

"The House recedes with an amendment which (1) taxes the oils enumerated in the Senate amendment, except sperm oil, perilla oil, and halibut liver oil; (2) taxes combinations or mixtures containing substantial quantities of taxable oils with respect to which there has been no previous first domestic processing; (3) retains the rate of 3 cents per pound on all the articles taxable, except that an additional tax of 2 cents (making a total of 5 cents) per pound is imposed on coconut oil (and combinations or mixtures containing substantial quantities of coconut oil) unless the oil is the product of the Philippines or other possessions or produced from materials from the Philippines or other possessions, or was in the United States on or before the 30th day after the enactment of the act or produced from materials in the United States on or before the same day, or was contracted for, or produced from materials contracted for, before April 26, 1934; (4) *changes the point of imposition of the tax* in the case of imported whale oil, imported fish oil, and imported marine animal oil to the *importation* instead of *the first domestic processing;* and (5) provides for payment to the Philippine treasury of taxes collected on coconut oil, and mixtures containing coconut oil of Philippine origin or produced from Philippine materials."

V.—Agricultural Adjustment Act, Sections 9(a), 15(e), and 16, approved May 12, 1933, 48 Stat. 31, p. 35 *et seq.*:

"Processing Tax

"Sec. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. *The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity,* whether of domestic production or imported, *and shall be paid by the processor.* The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided,* That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of

weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

* * *

"Supplementary Revenue Provisions

"Sec. 15. * * *

(e) During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or in chief value from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession of the United States to which this title does not apply, a compensating tax equal to the amount of the processing tax in effect with respect to domestic processing at the time of importation: *Provided,* That all taxes collected under this subsection upon articles coming from the possessions of the United States to which this title does not apply shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund and paid into the Treasury of the said possessions, respectively, to be used and expended by the governments thereof for the benefit of agriculture. Such tax shall be paid prior to the release of the article from customs custody or control."

"Floor Stocks

"Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (includ-

ing articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) *Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid* by such person *equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.*

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

(b) The tax imposed by subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held at the date the processing tax first takes effect; but such retail stocks shall not be deemed to include stocks held in a warehouse on such date, or such portion of other stocks held on such date as are not sold or otherwise disposed of within thirty days thereafter. The tax refund or abatement provided in subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held on the date the processing tax is wholly terminated."

VI.—Treasury Regulations under the Agricultural Adjustment Act construing "the first domestic processing."

Article 7 of Regulations 81, approved July 12, 1933, as originally promulgated under the Agricultural Adjustment Act, reads as follows:

"Art. 7. When tax attaches.—The tax attaches upon the first domestic processing of the commodity. Where some part of the first domestic processing of a particular quantity of the commodity takes place

during the period when a tax is in effect, the tax attaches, notwithstanding that some portion of the first domestic processing of such quantity takes place before or after such period."

Thereafter, on September 20, 1933, by T. D. 4392, Article 7 of Regulations 81 was amended to read (C. B. XII-2, p. 430):

"Art. 7. When tax attaches.—The tax attaches *at the beginning* of the first domestic processing of the commodity. When the first domestic processing *begins before the effective date, no tax attaches,* although it is not completed until after the effective date. When the first domestic processing begins while the tax is in effect, it is subject to the processing tax, notwithstanding it is not completed until after the tax is terminated."

Article 7 of Regulations 81 was further amended by T. D. 4403, approved November 2, 1933, to be effective retroactively to July 9, 1933, and to read in its *final form as follows* (C. B. XII-2, p. 430):

"Art. 7. When tax attaches.—The tax is imposed upon *the first domestic processing,* and is measured by the amount of the commodity put into such processing. The tax attaches to a particular quantity of the commodity (1) *if it is in process on the effective date, provided the first domestic processing has not been completed prior to that date,* or (2) if the first domestic processing is begun during the period while the tax is in effect, provided it is completed before the termination of the tax. Where the first domestic processing of a particular quantity of the commodity is completed prior to the effective date, but on the effective date such quantity is in secondary processing, it is subject to the tax on floor stocks (see Regulations 82)."

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IN THE

Supreme Court of the United States

October Term, 1943

Nos. 38 and 39

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

To begin with we are not dealing with a regulation that has acquired any sanctity from long-continued application (Gov't. Brief, pp. 8, 9-10). This regulation was challenged immediately. Petitioner made its first payment July 31, 1934 and protested that payment and every payment made thereafter. According to the statement in the Government's

memorandum filed in opposition to our petition for a writ, one hundred claims for refunds based upon the invalidity of the regulation were filed with the Commissioner of Internal Revenue. As only those who had domestically processed oils on hand on May 10, 1934 were affected by the regulation it would seem that the challenge to the regulation was general. In 1937 in the *Armour* case the regulation was declared invalid by the United States District Court for the Eastern Division of the Northern District of Illinois. The Government appealed but dropped the appeal and paid the judgment with interest. In 1938 the United States District Court for the Southern District of Ohio in the *Cincinnati Soap Co.* case held the regulation invalid on a demurrer by the Government to taxpayer's complaint, and from that decision the Government has never appealed. The validity of the regulation has been challenged in suits brought by six different taxpayers. In three of them (counting the instant cases as one) the Government has so far won, with a final judgment in two of the three; in three of the cases the Government has so far lost, and in one of the latter three by a judgment which is now final.

In the next place we are not dealing with a regulation that has been ratified by Congress. The Government cites the rule that reenactment without substantial change of a statutory provision may, in the absence of persuasive indication to the contrary, be regarded as legislative approval of a prior Treasury regulation and it argues that this rule is applicable to the facts of the present cases since "Congress, on one occasion, in 1935, has enacted legislation directly relating to the oils designated in Section 602½, and on five occasions, in 1936, 1938, 1941 and twice in 1942, has amended Section 602½ or its corresponding provisions in the Internal Revenue Code without any indication of disapproval of the Regulations" (Gov't. Brief, pp. 29, 30).

We have three observations with respect to this argument:

(a)

The reason for the rule is that if *in the continued application of the reenacted statutory* provision Congress intends that the reenacted provision shall have a different meaning than that given it in the Treasury regulation, it is presumed Congress will so indicate in the reenacted statute. However, the Treasury regulation here involved was not one of continuing application under the reenacted statute, but involved only the oils which had been domestically processed prior to the inception of the tax and were on hand on the date the tax became effective. In its brief in opposition to the Petition for Writs of Certiorari the Government was at particular pains to point out on page 4 that "The problem of statutory construction here involved concerns only stocks of oil on hand on May 10, 1934 *and is thus not of continuing importance.*" In all of the cases where this Court has applied the rule of reenactment without substantial change, the Treasury regulation in question has been of "continuing importance" under the reenacted statute. Where the regulation, as in the cases at bar, involves only the rights of taxpayers at the inception of a tax and will not be a recurring problem under the reenacted statutory provision, we submit that there is no reason why there should be imputed to Congress an intent to approve such a regulation.

(b)

By no stretch of the imagination can the enactment of Section 402 of the Revenue Act of 1935 be regarded as a reenactment of Section 602½ and a ratification of the regulation. That section simply imposed a compensatory im-

port duty upon articles made wholly or in chief value from the oils specified in Section 602½ (Gov't. Brief, App. p. 40). The amendments to Section 602½ or its corresponding provisions in the Internal Revenue Code which were enacted in the acts of 1938, 1941 and 1942 merely enlarged the exemption of palm oil in certain of its uses and provided for the payment over to Guam and Samoa of the tax collected on oils from those Islands and for the temporary suspension of the two-cent surtax on coconut oil of non-Philippine origin (Gov't. Brief, App. pp. 43-45). The Government does not seriously argue that any of these amendments constitute appropriate instances for the application of the rule of approval by reenactment without substantial change, and all these amendments were passed long after the regulation had spent its force.

(c)

With respect to the 1936 Amendment of Section 602½ in Section 702 of the Revenue Act of 1936, we have already pointed out that this amendment cannot constitute legislative approval for the reason, as the Court below correctly held, that the statute was not reenacted without substantial change; and for the further reason that the express language of the amendment in exemption clauses (1) and (2) thereof recognizes that there would be "previous first domestic processings *taxed under this section*", *i. e.*, processings occurring after May 10, 1934, and "previous first domestic processings" which were untaxed, *i. e.*, those occurring prior to May 10, 1934, which is wholly inconsistent with the Treasury regulation in question. (Pet. Orig. Brief, pp. 51-59.)

Furthermore, the regulation in question affects only the domestically processed oils on hand at the inception of the

tax on May 10, 1934. It strains credulity to think that Congress would have concerned itself to approve such regulation two years later in 1936 when such supply of domestically processed oils on hand May 10, 1934 must have been practically exhausted.

The Government's Statement of Petitioner's Position.

The Government says:

> "The taxpayer's position, as we understand it, is that the taxable event is the first domestic processing occurring after the effective date of the Act, provided that the oils have not received any previous domestic processing" (Gov't. Brief, p. 4).

That is not the taxpayer's position. The event on which the tax is imposed is "the first domestic processing" defined as "the first use in the United States in the manufacture or production of an article intended for sale." If that event occurs after May 10, 1934, it is a taxable event. If it occurs before May 10, 1934 it is not a taxable event. The statute is not retroactive.

Again the Court is told:

> "It is the taxpayer's position, as we understand it, that the statutory 'first domestic processing' *means* the first domestic processing occurring after the effective date of the Act, when, but only when, there has been no previous domestic processing" (Gov't. Brief, p. 8—Italics ours.)

The statutory phrase "the first domestic processing" *never*, under any circumstances, "*means*" the first domestic processing occurring after the effective date of the Act. It may in a given case *be* that processing, but in the instant case

it was not. "The first domestic processing" *means* what the statute says it means—"the first use in the United States in the manufacture or production of an article intended for sale."

The Government makes the astonishing statement that it is the petitioner and not the Government which seeks to qualify the language of the statute. Thus at page 19 we read:

> "The taxpayer, unlike the Government, would add the condition that the first domestic processing occurring after the effective date of the Act must also be the first in point of time without regard to the effective date."

At pages 9 and 27 are similar statements.

Of course that is without any basis in fact. It is the Government which seeks to qualify "the first domestic processing" by adding the Commissioner's interpolation—"on and after the effective date of the Act."

The Government apparently does not want to call attention to the fact that its construction is a qualification of the statutory definition. It quotes the statutory definition on page 11 of its brief but never thereafter mentions that uncomfortable definition again, except to say at the bottom of that page that "the meaning and effect to be attributed to the word 'first' * * * is not further illuminated by the foregoing definition." What further illumination is needed!

The Government's Assumptions.

The Government's brief rests in large part upon an assumption of the thing to be proved. The Government says, for example, that "whatever its meaning 'first domestic processing' must be defined in terms of a taxable event."

What the Government is here saying is that the phrase must be so defined as to make every first domestic processing taxable, which is to assume what is to be proved (Gov't. Brief, p. 6). It must be defined as the statute defines it—"the first use in the United States in the manufacture or production of an article intended for sale."

At page 7 of the Government's brief is this:

> "Properly analyzed, the question is whether there is anything in the statute which conflicts with the application of the tax to all first domestic processings occurring after the effective date of the Act; * * *."

Here again is the assumption that the tax is to be taken as extending to every domestic processing which happened to be the first after May 10, 1934 unless the petitioner can show something in the statute which conflicts with that construction. Not that there is any difficulty in showing that. The statutory definition conflicts with the Government's construction. And outside the language of the section its entire history conflicts with that construction, as does the intent of Congress disclosed in the debates. In the statement that "the question is whether there is anything in the statute which conflicts with the application of the tax to all first domestic processings occurring after the effective date of the Act" is the further implication that taxpayer's construction does not so apply the Act. That, of course, is not true. Every domestic processing which occurs after the date of the Act and which is in fact the first domestic processing is taxable. The question is whether a second domestic processing may be taxed if it happens to be the first occurring after that date.

Again the Government says:

> "If Congress had intended to attach some additional condition or qualification to the taxable event, such

> as a provision that the oils must not have received a domestic processing before the effective date of the Act, it would presumably have used express language manifesting this intention" (Gov't. Brief, p. 14).

This assumes that in the absence of such "additional condition or qualification" the domestic processing next after the effective date of the Act is the taxable processing notwithstanding it may not be *the first* domestic processing, which is an assumption and not proof that "first" means "first after the effective date of the Act."

On page 17 of its brief the Government makes this statement:

> "Whatever canons of statutory construction are to be invoked, the 'first domestic processing' of the specified oils must be defined in terms of a taxable event. Oils in combinations or mixtures are subjected to the tax where there has been no 'previous first domestic processing' with respect to them. Therefore, whatever the definition of 'first domestic processing,' oils in combinations or mixtures must pay a tax upon the first domestic processing of the combination or mixture unless they have previously paid their way."

What the Government means by this is that the term "first domestic processing" must be so defined as to make every first domestic processing taxable. There is no such compulsion. That is pure assumption.

On page 20 of the Government's brief is this argument: Because Philippine coconut oil and certain other coconut oil is specifically excluded from the additional tax of two cents a pound levied "upon the first domestic processing of coconut oil," "it is reasonable to assume" that Congress would similarly have excluded from the basic three cent tax oils which had been subjected to non-taxable domestic

processing prior to the effective date of the Act. That argument assumes that in the absence of such specific exclusion those oils are taxable. That is to say, it assumes that "first" means "first after the effective date of the Act." Otherwise there would be no necessity for a specific exclusion of a second domestic processing when the statute taxes only "the first."

Petitioner does not assert any exemption. The statute taxes only "the *first* use" of oils "in the manufacture or production of an article intended for sale" and second, third, fourth and fifth uses do not need exemption.

The Government's Argument with Respect to the Agricultural Adjustment Act.

Ignoring all the evidence in the Congressional debates that the tax under Section 602½ was the same processing tax as that to which the commodities were subjected which were included in the A. A. A., the Government insists that it does not follow from the identity of the language that "the first domestic processing" should be given the same construction in both acts. The brief states, at page 26:

> "* * * The Commissioner's interpretation of 'first domestic processing' under the Agricultural Adjustment Act was thus required by reasons peculiar to that Act, not present with respect to Section 602½."

The floor-stock tax in the Agricultural Adjustment Act may have given a further reason for giving to the phrase "the first domestic processing" its normal significance but it doesn't follow that in the absence of a floor-stock tax the phrase should not be given its normal significance. The presence in one act and the absence from the other of a floor-stock tax does not render the two acts *not in pari materia* in respect of the tax which is common to both and

was intentionally and consciously taken from the one and put into the other, with the intent of further effectuating the purposes of the prior act.

The Purpose of Section 602½.

It is stated at various places in the Government's brief that the purpose of the tax was both revenue and protection, but those who debated the bill in Congress (whose statements the Government ignores) agreed that it was not intended to raise revenue but that its purpose was to restrict imports. Its advocates were for it because its purpose was to restrict imports. Its opponents were against it for the same reason; they thought restriction of the importation of coconut oil was unfair to the Philippines. We again call attention to some of the extracts from the debates quoted in our original brief.

> "* * * it was thought * * * that as we were * * * limiting the production of our farmers that we might put some restriction on the commodities from abroad * * *." (Chairman Doughton of the Ways and Means Committee)
>
> "* * * a home market that would be protected against this pernicious flood of coconut and sesame oils." (Congressman Johnson)
>
> "* * * there are a good many Senators here who want to abide by the independence act, but, at the same time, they desire to put a fair limitation on imports." (Senator Harrison)
>
> "* * * the proponents of this tax are not expecting revenue but are seeking only to prevent the importation of coconut oil." (Congresswoman Kahn)
>
> "* * * I assert this excise tax to be nothing more or less than a prohibitive tariff * * *." (Congressman Welch)

"It is not understood why in this legislation we should seek to penalize the Philippines by restricting their imports to this country in oils * * *." (Congressman Hoeppel)

"The Senator from Pennsylvania (Senator Reed) knows, I am sure, that the primary purpose of this tax is not revenue, but its primary purpose is to discriminate against the Philippine people." (Senator Tydings)

"The primary purpose of the processing tax is to raise prices and not to raise revenue." (Senator Reed)

There is sufficient internal evidence in the section itself that the tax was not designed to raise revenue. The tax paid on the most important of the oils, Philippine coconut oil, was to be paid over to the Philippine Treasury. Palm oil used in the manufacture of tin plate was exempt because in that use it has no domestic competitor. And we may be sure that Congress would not have picked out for revenue taxation oils which are mostly used in the production of articles of food and the production of soap, both among the primary necessities.

This assumption that a purpose of the tax was to raise revenue underlies the Government's wholly fanciful idea as to the manner in which the language of the section was evolved. The Government says in effect on page 13 that Congress made up its mind to tax the "domestic processing" of these oils and, of course, contemplated the taxation of future processings only, but among those future processings it had to select the one to be taxed and so selected the first. Of course the fact is that Congress went through no such mental process. Congress decided to subject these oils to the same tax to which domestic products

with which they competed were already subject under the Agricultural Adjustment Act and took the tax from that Act, as was, which was a tax upon the first domestic processing in fact.

The Government disputes our contention that the extension of the tax to oils already in the hands of manufacturers on May 10, 1934 and already domestically processed and in the course of conversion into finished articles would effect no protection. (Obviously it would effect no restriction.) It is said that that contention leads to the conclusion that the levying of the processing tax on the first domestic processing of crude oils in this country on that date would likewise effect no protection—a *reductio ad absurdum.* (Gov't. Brief, p. 22.)

Domestically processed oils in the hands of manufacturers and already in the course of conversion into finished articles are not oils held for sale. The manufacturer will neither throw them away if they are taxed and replace them with domestic oils and fats (the oils involved in these cases were not thrown away) nor will they go out into the channels of trade to compete with American fats and oils. The competition ended when the manufacturer bought the foreign oils. Crude oils, on the other hand, in the hands of dealers and crushers must be sold and they will inevitably compete with American fats and oils so far as they are interchangeable. If they cost the dealer's vendee their market price (say 2½ cents per pound *) plus 3 cents for the privilege of using them, the competing American oil has only to meet an over-all price of 5½ cents instead of a price of 2½ cents.

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* It was stated in the debates in the House that in April, 1934 the price of coconut oil was 2½ cents.

The Phrase "no previous first domestic processing" in the 1934 Act.

A circumstance which appeared to the Circuit Court of Appeals for the Second Circuit, in the *Loose-Wiles Biscuit Company* case, to indicate that the Treasury regulation was "reasonable" (but which that Court expressly stated was not relied upon for any further conclusion) has been seized upon by the Government as a compelling circumstance inexorably leading to the Treasury Department's interpretation. The circumstance is this. The provision in the 1934 Act with reference to the taxation of mixtures and combinations is that they are taxable where there has been "no previous first domestic processing" of the contained oil. The argument is that the purpose of the limitation was to avoid double taxation; that it must therefore be assumed that "the first domestic processing" is synonymous with a taxable processing. If "the first domestic processing," the argument continues, means the earliest domestic processing whether taxed or not, it would have sufficed to provide that mixtures and combinations were taxable only where there has been "no previous domestic processing" of the contained oil, omitting the word "first" as being superfluous and "tautological." (Gov't. Brief, pp. 15-16.) There are several answers.

(a)

This is not in any case a circumstance that, in the words of Mr. Justice Holmes, "by ineluctable logic, requires the conclusion" derived therefrom by the Government, and certainly it cannot weigh against the plain evidence of the debates that Congress intended to levy on these foreign oils the same processing tax as that same Congress had previ-

ously imposed under the Agricultural Adjustment Act upon domestic products with which they compete, and against the conceded fact that the tax provided for in the earlier act was a tax on the first domestic processing in fact and not on the first domestic processing after the effective date of the tax. The evidence from the debates is set out in our original brief at pages 39-46 but is ignored by the Government.

(b)

Either construction of the phrase "the first domestic processing" gives complete immunity from double taxation, so that the purpose to effect that immunity points no more compellingly to one construction than to the other.

(c)

Taxpayer's construction gives quite as reasonable a result as that propounded by the Government and is consistent with the intent disclosed by the debates, which the Government's construction is not. The tax upon unmixed oils was on their "first domestic processing." If the earliest domestic processing of an oil had occurred *before* May 10, 1934, the oil was not, under taxpayer's construction, subject to the tax. Consistently with that, if the oil which had been thus first domestically processed prior to May 10, 1934 were introduced into a mixture, the mixture was not taxable because the oil itself was not taxable. And if the oil had been first domestically processed *after* May 10, 1934, the mixture was again not taxable—in that case because that would be double taxation of the contained oil. That is to say, the mixture was not to be taxable if the contained oil had received a "previous first domestic processing" regardless of the time when that occurred, because, regardless of

the time when that occurred, the oil itself would not be taxable. That is *precisely* what the statute says, without qualification.

That is likewise a complete answer to the contention that the Treasury interpretation is necessary to bring it about that oils and combinations of oils shall be treated alike (Gov't. Brief, pp. 17-18). Petitioner is not here falling into the Government's habit of assuming that its construction is right and arguing from that premise. What we are saying is that petitioner's construction does not result in unequal treatment of oils and mixtures. Mixtures are taxable only if the contained oil is taxable.

(d)

The draftsman of the Act would naturally follow the word "previous" with the phrase "first domestic processing" in its entirety and not with the phrase "domestic processing" because "the first domestic processing" is the term that is defined in the Act. It was nothing but ordinary good draftsmanship, involving no superfluity, to use the terminology which was so defined.

(e)

The Government can hardly afford to base an argument on the "tautology" alleged to reside in the 1934 Act if petitioner's construction is right. For there is a manifest tautology, if the Government's construction is right, in the phrase in the first exemption clause of the 1936 Amendment —"previous first domestic processing taxed under this section"—tautological because under the Government's construction every "first domestic processing" is taxable. The Government attempts to explain that away thus:

> "It thus seems clear that the phrase 'taxed under this section,' as it appears in clause (1) of paragraph (a) of the amendment, was inserted merely out of an abundance of caution, to make clear beyond any possible dispute that the statutory 'first domestic processing' is a taxable processing" (Gov't. Brief, p. 36).

Why then was not that same superlative caution employed in the second exemption clause where the exemption of mixtures is conditioned merely on "a previous domestic processing"? Why was not "abundance of caution" equally employed in drafting the original act if "previous first domestic processing" there means "previous domestic processing taxed under this section"? And if the word first is superfluous in the phrase "previous first domestic processing" in the 1934 Act, under our construction, it is obviously equally superfluous in the phrase "previous first domestic processing taxed under this section" in the 1936 Amendment, under the Government construction; "previous domestic processing *taxed under this section*" would suffice.

The fact is, as we have stated, that there is no useless tautology either in the 1934 Act or the 1936 Amendment. The use of the complete phrase "previous first domestic processing" instead of "previous domestic processing" was merely the use in its entirety of the phrase the meaning of which was fixed by the statute. Furthermore, the addition in the first exemption clause of the 1936 Amendment of the words "taxed under this section" is not tautological because those words were put there to distinguish "previous first domestic processings" that were taxed from those that were not. The addition of those words in the first exemption clause and not the second was not the bungling of a sloppy draftsman, employing an "abundance of caution" in one clause but none in the other. The two exemption

clauses, both new in the 1936 Amendment, were inserted by the Conference Committee at the same time. The second exemption clause relating to mixtures was conditioned on "a previous domestic processing," without further limitation because there was thus carried forward in substance, though in a new form, the provision with respect to mixtures in the original statute, enacted by the 72d Congress, which had obtained for more than two years. But with respect to fatty acids and salts there had been no provision in the original act. The 73d Congress could deal with them as it saw fit. And they were exempted only if they resulted from a "previous first domestic processing taxed under this section."

(f)

Certainly, even if taxpayer's construction could be thought to import a redundancy into the 1934 Act, that construction is not to be rejected for that reason against the overwhelming evidence to be found in the legislative history of Section 602½ and in the debates and committee reports that taxpayer's construction is precisely the construction which Congress contemplated and intended.

The Contention that Taxpayer's Construction Makes the Statute Retroactive.

On page 19 of the Government's brief, that contention is put this way:

> "• • • Fundamental to the taxpayer's theory, also, is the contention that the 'ordinary,' 'normal,' and 'literal' meaning of 'first' should be employed. (Pet. Br. 9-10) But the foregoing is inconsistent with the taxpayer's basic position that 'first domestic processing' cannot be taken so literally as to *refer to*

> *a taxable operation* occurring prior to the Act (Pet. Br. 60). Accordingly, the taxpayer could hardly mean that the statutory 'first domestic processing' includes a first domestic processing in point of time, which may have occurred prior to the effective date of the Act, for this would immediately raise the question whether the statute was intended to be retrospectively applied, and the taxpayer certainly does not concede that it should be." (Italics ours.)

On page 7 the argument is expressed thus:

> "* * * If, as the taxpayer maintains, 'first domestic processing' meant first in point of time, the statute on its face would require retrospective application, a result for which neither side contends."

In other words, if "first" means earliest, there is a rigorous necessity to stretch the statute so that it will apply to those "first domestic processings" which occurred before it took effect, because, according to the argument, the statute must be taken to apply to all first domestic processings. The above quotation from page 19 is a ridiculous perversion of "taxpayer's basic position." The statute "refers" to "the first domestic processing." If that occurs after its effective date, it is "a taxable operation"; if it has occurred before that date, it is not "a taxable operation," because statutes are applied prospectively and not retroactively.

The Alleged Inequalities Resulting from Petitioner's Construction.

The Government's brief, page 24, suggests an imaginary and extremely unlikely situation in which coconut oil is assumed to have been neutralized abroad and then imported, and in which the Government says Section 602½, as peti-

tioner construes it, might have worked a temporary inequitable result.

That is to say, in construing Section 602½ we are to fly in the face of the usual and normal meaning of the language of the Section and to disregard its source, legislative history and purpose because the Government is able to think up a hypothetical case in which the construction for which the Government contends would relieve a temporary inequity between hypothetical processors. The case is hypothetical to the degree that seldom, if ever, is imported coconut oil neutralized before importation. This for cost reasons. There are few, if any, tax or import laws which do not result in some temporary inequalities at their inception. Such always result when new tariff duties are enacted.

The Contention that the Treasury Regulation Has Not the Practical Effect in this Litigation of a Floor-Stock Tax.

We have noted in our original brief that the Ways and Means Committee was urged to include a floor-stock tax in Section 602½ but it did not do so, and that the Government has by construction supplied in part that intentional omission. With respect to the oils involved in this suit—and all oils domestically processed prior to May 10, 1934 which on that date still remained oils—the Government's construction has the same practical effect as though a floor-stock tax were enacted. The Government argues (p. 27) that "no question of this nature is presented here" because the regulation does not "reach articles *wholly processed* at the effective date of the Act." The fact that the regulation does not cover the whole field which would be covered by a floor-stock tax is no answer to the argument that the regulation does cover a part of the field. If a floor-stock tax had been enacted in Section 602½, the oils involved in this suit

would have been subject to such tax (see Art. 7, Reg. 82, Pet. Orig. Brief, p. 17). And the Government, by regulation interpreting "first" to mean first after May 10, 1934, has accomplished the same practical effect with respect to these processed oils notwithstanding Congress elected not to levy a floor-stock tax in Section 602½.

The Government's Contention that Under the 1936 Amendment (1) Fatty Acids and Salts and (2) Combinations and Mixtures Are Treated the Same.

The Government's brief says:

> "*Even on the taxpayer's view, the domestic processing of a fatty acid or salt occurring after the 1936 amendment would not escape taxation unless a prior tax had been paid with respect to that fatty acid or salt.* Yet the same fatty acid or salt, under clause (2), would escape taxation when domestically processed after the 1936 amendment if combined or mixed with some other product, even though no prior tax had been paid on the fatty acid or salt" (Gov't. Brief, p. 37).

Again the Government attributes to the taxpayer a view which the taxpayer does not hold. For example, if after the importation of a fatty acid it was subjected to a first domestic processing prior to August 21, 1936 that would not be taxed because the processing of acid was not taxable before that date; and if after that date it was subjected to another processing, that processing would not in taxpayer's view be taxable because that would be the second domestic processing of that fatty acid—not "the first." Thus the premise of the Government's argument does not represent the taxpayer's view. The final conclusion at which the Government arrives is this:

> "Under the proper view both clauses (1) and (2) refer to a taxable processing; hence, the fatty acids, salts and oils, whether in or out of a combination or mixture, are treated exactly the same" (Gov't. Brief, p. 37).

That is to say, notwithstanding that Congress, in explicit language in clause (1) conditioned the exemption of fatty acids and salts upon their resulting from "a previous domestic processing *taxed under this section*" and in clause (2) conditioned the exemption of combinations or mixtures upon there being a "previous first domestic processing" of the oil ingredient, the Government concludes that the two clauses should be construed to have the same meaning. Why, if both clauses have the same meaning, did Congress take the trouble to write into the statute two exemption clauses. One exemption clause would have sufficed to cover fatty acids and salts, combinations and mixtures alike. If fatty acids and salts are to be treated exactly the same as combinations or mixtures, Congress was enacting useless verbiage in writing into the statute two exemption clauses —one with the limitation "taxed under this section" and one without such limitation.

Respectfully submitted,

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525266—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

NOS. 907 AND 908

COLGATE-PALMOLIVE-PEET COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 1–8) is reported at 37 F. Supp. 794. The opinion of the Circuit Court of Appeals (R. 39–47), as amended (R. 52–54, 60), is reported at 130 F. 2d 913. A dissenting opinion in that court, rendered on rehearing, appears at R. 54–56.

JURISDICTION

The order of the Circuit Court of Appeals entered November 11, 1942 (R. 60), denying a petition for a second rehearing, confirmed the judgments of the court previously entered (R. 56–57).

By order of a Justice of this Court dated February 3, 1943, the time for filing a petition for certiorari was extended for a period of sixty days from and after February 10, 1943 (R. 62). The petition for a writ of certiorari was filed April 10, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the tax imposed by Section 602½ of the Revenue Act of 1934, and by that section as amended, upon the "first domestic processing" of certain oils, applies to the first domestic processing after the effective date of the Act of oils which had received one or more domestic processings prior to that date.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in the Appendix, *infra*, pp. 5–8.

STATEMENT

Section 602½ of the Revenue Act of 1934 (Appendix, *infra*, p. 5) imposed a tax upon the "first domestic processing" of certain vegetable oils. On May 10, 1934, the effective date of the Act, petitioner had on hand a large quantity of these oils which had received one or more domestic processings. From May 10, 1934, to January 31, 1937, petitioner further processed the oils, and paid a tax upon their first domestic processing after the

effective date of the Act (R. 10–24, 26–38). Petitioner then brought suits for refund of the amounts so paid, contending that the tax was improperly collected since the oils had already been subjected to a "first domestic processing" prior to the effective date of the Act (R. 1–5). The District Court dismissed the complaints (R. 1, 25). On appeal, the Circuit Court of Appeals affirmed (R. 47–48). Thereafter it granted a petition for rehearing (R. 51), and again affirmed, one judge dissenting (R. 52–57). The court denied a petition for a second rehearing (R. 60).

ARGUMENT

Treasury Regulations 48, promulgated under Section 602½ of the Revenue Act of 1934, define "first domestic processing" to mean "the first use in the United States on or after the effective date of the Act."[1] The decision below sustains the validity of the Regulations and accords with the decisions in *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. 2d 438 (C. C. A. 2), certiorari denied, 305 U. S. 611, and *Tasty Baking Co.* v. *United States*, 38 F. Supp. 844 (C. Cls.), certiorari denied, 314 U. S. 654. There is no conflict with the decision of any other Circuit Court of Appeals, and none is

[1] These Regulations were promulgated August 17, 1934, and, as modified to conform to amendments to the statute, have been continuously in effect since that time. The definition of "first domestic processing" referred to appeared in the original Regulations as Article 1 (1). It appears in the amended Regulations as Article 1 (n) (Appendix, *infra*, pp. 7–8).

alleged. The problem of statutory construction here involved concerns only stocks of oil on hand on May 10, 1934, and is thus not of continuing importance. We are informed by the Bureau of Internal Revenue that although claims for refund in some 100 similar cases were filed by taxpayers following the enactment of the Revenue Act of 1934, all but five, aside from the instant case, have been disposed of during the past nine years. The problem is of less consequence today than it was when the petition for certiorari in the *Tasty Baking* case was denied, in October 1941.

CONCLUSION

The case does not call for review by this Court. It is respectfully submitted that the petition should be denied.

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MAY 1943.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680, 763:

SEC. 602½. PROCESSING TAX ON CERTAIN OILS.

(a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernal [1] oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sentence) a tax of 2 cents per pound, to be paid by the processor, upon the first domestic processing of coconut oil or of any combination or mixture containing a substantial quantity of coconut oil with respect to which oil there has been no previous first domestic processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such coconut oil (whether or not contained in such a combination or mixture), (A) is wholly the production of the Philippine Islands or any other possession of the United States, or (B) was produced wholly from materials the growth or production of the Philippine Islands or any other pos-

[1] So in original.

session of the United States or (C) was brought into the United States on or before the 30th day after the date of the enactment of this Act or produced from materials brought into the United States on or before the 30th day after the date of enactment of this Act, or (D) was purchased under a bona fide contract entered into prior to April 26, 1934, or produced from materials purchased under a bona fide contract entered into prior to April 26, 1934. All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For the purposes of this section the term "first domestic processing" means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate.

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1742:

SEC. 702. PROCESSING TAX ON CERTAIN OILS.

(a) The first sentence of section 602½ of the Revenue Act of 1934 is amended to read as follows:

"(a) There is hereby imposed upon the first domestic processing of coconut oil,

palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts, a tax of 3 cents per pound to be paid by the processor, but the tax under this section shall not apply (1) with respect to any fatty acid or salt resulting from a previous first domestic processing taxed under this section or upon which an import tax has been paid under section 601 (c) (8) of the Revenue Act of 1932, as amended, or (2) with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been a previous first domestic processing or upon which an import tax has been paid under such section 601 (c) (8)."

(b) Notwithstanding the provisions of subsection (a) of this section, the first domestic processing of sunflower oil or sesame oil (or any combination or mixture containing a substantial quantity of sunflower oil or sesame oil), if such oil or such combination or mixture or such oil contained therein was imported prior to the effective date of this title, shall be taxed in accordance with the provisions of section 602½ of the Revenue Act of 1934 in force on the date of the enactment of this Act.[2]

[2] Section 602½ of the Revenue Act of 1934, as amended, was carried into the Internal Revenue Code as Sections 2470–2482 (U. S. C., Title 26, Sec. 2470–2482).

Treasury Regulations 48, promulgated under the Revenue Act of 1934:

> Art. 1 [as amended by T. D. 4695, XV-2 Cum. Bull. 324. (1936)]. *Definitions.*— When used in these regulations, the term—
>
> * * * * *
>
> (*n*) ***First domestic processing*** means the first use in the United States on or after the effective date of the Act. At all times in these regulations, the term *processing* or *first domestic processing* will be deemed to be synonymous with "use" or "first use in the United States on or after the effective date," respectively. * * *.

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The opinion of the District Court for the District of Delaware (R. 1–7) is reported at 37 F. Supp. 794. The opinion of the Circuit Court of Appeals (R. 29–37), as amended (R. 42–44, 50), is reported at 130 F. 2d 913. A dissenting opinion in that court, filed on rehearing, appears at R. 44–46.

JURISDICTION

The order of the Circuit Court of Appeals entered November 11, 1942 (R. 50), denying a petition for a second rehearing, confirmed the judgments of the court previously entered (R. 46–47). By order of a Justice of this Court dated February 3, 1942, the time for filing a petition for certiorari was extended for a period of sixty days from February 10, 1943 (R. 52). A petition for a writ of certiorari was filed April 10, 1943, and was denied May 24, 1943. A petition for reconsideration of the petition for certiorari was filed June 10, 1943. The petition for reconsideration was allowed and writ of certiorari granted on June 14, 1943. (R. 53–54.) Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the tax imposed by Section 602½ of the Revenue Act of 1934, and by that section as amended, upon the "first domestic processing" of certain oils, applies to the first domestic processing after the effective date of the Act of oils which had received one or more domestic processings prior to that date.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in the Appendix, *infra*, pp. 39–50.

STATEMENT

Section 602½ of the Revenue Act of 1934 (Appendix, *infra*, pp. 39–40) imposed a tax upon the "first domestic processing" of certain vegetable oils. Treasury Regulations 48, promulgated August 17, 1934 (Appendix, *infra*, p. 47), defined "first domestic processing" to mean "first use in the United States on or after the effective date of the Act." The taxpayer is a corporation organized under the laws of Delaware, with its principal place of business in Jersey City, New Jersey. At all pertinent time it was engaged in the manufacture and sale of soaps and other products, in the preparation of which it used coconut oil, palm kernel oil, palm oil, and sunflower oil. (R. 8, 19.) On May 10, 1934, the effective date of the Revenue Act of 1934, the taxpayer had on hand a large quantity of these oils which had received one or more domestic processings. From May 10, 1934, to January 31, 1937, the taxpayer further processed these oils and, as required by the Regulations, paid a tax upon their first domestic processing after the effective date of the Act. (R. 8–16, 19–26.) Following denials of its claims for refund (R. 15, 24), the taxpayer brought two suits for the recovery of the taxes involved, in the aggregate principal amount of $2,362,382.37 (R. 15–16, 24). The District Court dismissed the complaints (R. 1, 18). On appeal, the Circuit Court of Appeals affirmed (R.

37–38). Thereafter it granted a petition for rehearing (R. 41), and again affirmed, one judge dissenting (R. 42–47). The court denied a petition for a second rehearing, at the same time amending its opinion on rehearing in certain particulars (R. 50).

SUMMARY OF ARGUMENT

I

Section 602½ of the Revenue Act of 1934 imposes a tax upon the "first domestic processing" of the oils here involved and

> of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, * * *.

The taxpayer's position, as we understand it, is that the taxable event is the first domestic processing occurring after the effective date of the Act, provided that the oils have not received any previous domestic processing. It is the Government's position that the taxable event is the first domestic processing occurring after the effective date of the Act, without further condition. There is no dispute as to the meaning of "domestic processing," which is defined in the statute; the controversy relates to the meaning and effect to be given the word "first."

The oils here involved are customarily subjected to a series of processings, and Congress did not identify any specific processing operation. Thus, any processing, whatever its physical aspects, may be a taxable processing so long only as it constitutes the statutory "first domestic processing." On this background, there are several independent criteria, all of which point to the necessary conclusion that the taxable event is simply the first domestic processing occurring after the effective date of the Act:

(1) The rule requiring the prospective operation of statutes goes far to resolve the controversy. In its statutory context, the natural meaning of "first domestic processing" is first occurring after the effective date of the Act, and the words exhaust their purpose when they have so identified the taxable event.

(2) The unusual phrasing "*previous first* domestic processing" [italics supplied], in connection with combinations or mixtures, shows that "first domestic processing" is not used in its "literal" sense, to mean first in point of time, but is used in a peculiar statutory sense.

Oil in combinations or mixtures is f ed from the tax not where it has undergone a *previous* domestic processing, but only where it has received a *previous first* domestic processing. A category of previous domestic processings would include all

prior domestic processings; the category of previous first domestic processings is narrower and must refer only to previous domestic processings occurring after the effective date of the Act. Hence, oil in combinations or mixtures is taxed, notwithstanding any number of times it may have been previously processed, unless it has undergone a *taxable* processing. Previous "first domestic processing" is thus used to mean previous first domestic processing occurring after the effective date of the Act and nothing else. There is, moreover, no reason to believe that "first domestic processing" has any different meaning when preceded by the word "previous" than the first time it appears in the statute in imposing the tax upon the oils outside of combinations or mixtures. The evident purpose, on the contrary, is to treat all the oils, whether in or out of combinations or mixtures, exactly the same. In the case of all the oils, therefore, the taxable "first domestic processing" is the first domestic processing after the effective date of the Act, without regard to prior domestic processings.

The tax is explicitly imposed upon the "first domestic processing" of the designated oils; whatever its meaning, "first domestic processing" must be defined in terms of a taxable event. The processing of oils in combinations or mixtures is hence relieved from the tax only when there has been a previous *taxable* processing of them.

Since there is no reason to believe that oils in combinations or mixtures are treated differently from other oils, it follows likewise that none of the oils is relieved from the tax by virtue of any number of domestic processings prior to the effective date of the Act.

(3) The taxpayer's insistence upon the so-called literal meaning of "first" is fallacious. If, as the taxpayer maintains, "first domestic processing" meant first in point of time, the statute on its face would require retrospective application, a result for which neither side contends. Properly analyzed, the question is whether there is anything in the statute which conflicts with the application of the tax to all first domestic processings occurring after the effective date of the Act; nothing in the statute does so conflict and, on the contrary, various other provisions of the statute lead to the same understanding of the taxable event.

(4) The purposes of Section 602½, both as a revenue measure and as a protection for domestic fats and oils, require that the stocks of oil on hand at the effective date of Section 602½ and still in the course of processing be included within the tax.

II

Treasury Regulations 48, promulgated August 17, 1934, define "first domestic processing" to mean "first use in the United States on or after

the effective date of the Act." The statute and the applicable Regulations have been in effect some nine years, and millions of dollars have been collected on this understanding of the taxable event. In these circumstances, particular weight should be given to the administrative construction of the statute in its narrow application to the stocks of oil on hand at the time it became effective. Moreover, the administrative construction is fortified by a series of amendments to the statute under circumstances which are persuasive that if Congress had disapproved of the Regulations it would have made known its disagreement.

ARGUMENT

The expression "first domestic processing" as used in Section 602½ of the Revenue Act of 1934, and in that section as amended, means the first domestic processing occurring after the effective date of the Act

The sole question consists of the proper construction to be given to the statutory term "first domestic processing," as applied to a large quantity of coconut oil, palm kernel oil, palm oil and sunflower oil which was subjected to a series of domestic processings occurring both before and after May 10, 1934, the effective date of the Revenue Act of 1934. It is the taxpayer's position, as we understand it, that the statutory "first domestic processing" means the first domestic processing occurring after the effective date of the Act *when, but only when, there has been no*

previous domestic processing (*infra*, pp. 18–19). It is the Government's position that the statutory "first domestic processing" means the first domestic processing occurring after the effective date of the Act, without more, and that there is no warrant for adding any further condition.

We shall discuss, first, the provisions of Section 602½ of the Revenue Act of 1934 (Appendix, *infra*, pp. 39–40) and their legislative background, which, we submit, support the conclusion that the taxable event is the first domestic processing occurring after the effective date of the Act, unencumbered by any further condition or qualification. At the very outset it should be emphasized, however, that the Court is not being called upon to write its construction of the statute on a blank sheet, as with respect to legislation freshly passed by the Congress and approved by the President. Section 602½ and the pertinent Treasury Regulations, which were promulgated August 17, 1934, have now been in effect some nine years. During this period the Treasury has consistently applied the statute so as to tax all first domestic processings occurring after May 10, 1934, and millions of dollars have been collected on this understanding of the taxable event. Until June 1, 1943, with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Durkee Famous Foods* v. *Harrison*, 136 F. 2d 303, no appellate court had denied the validity of the Regulations, and the

Circuit Court of Appeals for the Second Circuit, the Court of Claims[1] and the Circuit Court of Appeals for the Third Circuit, in the instant suits, had squarely sustained the Regulations. Pursuant to established principles, such a contemporaneous and continued administrative interpretation of a taxing statute will not be disturbed unless the administrative practice is plainly inconsistent with the statute. And this is especially true where, as here, the administrative construction is fortified by amendments to the statute under circumstances which peculiarly compel the conclusion that had Congress disapproved the Regulations it would have said so. Following our discussion of the provisions, subject matter and policy of Section 602½, we shall therefore proceed to a discussion of the weight to be accorded the Regulations in the circumstances presented.

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[1] *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. 2d 438 (C. C. A. 2d), certiorari denied, 305 U. S. 611; *Tasty Baking Co.* v. *United States*, 38 F. Supp. 844 (C. Cls.), certiorari denied, 314 U. S. 654. In addition to the *Durkee* case, *supra*, two early District Court rulings went against the Government. *Cincinnati Soap Co.* v. *United States*, 22 F. Supp. 141 (S. D. Ohio); *Armour & Co.* v. *Harrison* (N. D. Ill.), decided July 14, 1937 (19 A. F. T. R. 1347), appeal dismissed, 95 F. 2d 993 (C. C. A. 7th). The *Cincinnati Soap* decision was on demurrer and the case has not yet been tried. The *Armour* decision concerned primarily the question whether the materials with respect to which the tax was paid had retained their character as oil on the effective date of the Act. The case was settled prior to the argument of the appeal.

A. The text, subject matter and evident purpose of the statute

Section 602½ of the Revenue Act of 1934 imposes a tax upon the "first domestic processing" of the oils here involved, all of which are of foreign origin, as well as upon the—

> first domestic processing * * * of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, * * *.[2]

There is no argument as to the meaning of "domestic processing." The statute defines "first *domestic processing*" to mean the "first *use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed;* * * *." [Italics ours.] It is agreed that the oils in question received a "domestic processing" after the effective date of Section 602½ and that the tax has been paid on the first domestic processing occurring after that date. The controversy, then, turns upon the meaning and effect to be attributed to the word "first," which is not further illuminated by the foregoing definition.

There are two pertinent circumstances at the outset: (1) The vegetable oils referred to in the statute are customarily subjected to a series of

[2] This tax was considered in *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, where it was sustained against constitutional objections.

separate processing operations.[3] (2) The statute does not identify any particular process. Had the statute defined the taxable processing in terms of some specific operation, there could have been no controversy as to the proper description of the taxable event. Congress did not do so, but instead imposed a tax upon the "first domestic processing," whatever that operation might be. Thus, any particular processing may constitute a taxable processing. As to some oils, the taxable processing may be the neutralizing process; as to others, it may be the deodorizing process, the hydrogenating process, or some other operation differing radically in its physical nature from the first processing and perhaps far removed in point of time from it. By its failure to define the taxable event in terms of a particular operation, the statute shows that it is not concerned with the physical condition of the oil or the number of processings it has previously undergone, so long, only, as the later operation meets the statutory test

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[3] Treasury Regulations 48, as amended, Article 1 (m) (1) (Appendix, *infra*, p. 46), name nine district processing operations as illustrative of those to which the tax may apply. In the original Regulations this provision appeared as Article 1 (k) (1).

[4] As indicated, Treasury Regulations 48 have been amended since their original issuance. This has been done in order to conform them to amendments to the statute. As so amended, the Regulations are applicable to all periods since May 10, 1934. In referring to a provision of the Regulations in their present, amended form, we also give the corresponding provision, usually identical, in the original Regulations.

of "first domestic processing." This much, we believe, is not in dispute.

(1) Against this background, the rule requiring the prospective operation of statutes goes far to resolve the present controversy. What is taxed is a "domestic processing" of the oils. Had the statute used the expression "domestic processing" alone, there would doubtless be no question that only domestic processings occurring after the effective date of the Act were included within the description of the taxable event. This follows from the rule of prospective operation, that statutes are generally construed to operate only on events occurring subsequent to their effective date unless a contrary intention is manifested. Cf. *Hassett* v. *Welch*, 303 U. S. 303; *Bingham* v. *United States*, 296 U. S. 211; *Shwab* v. *Doyle*, 258 U. S. 529. Because of the circumstance that the oils involved are customarily subjected to a series of processings, the statute could not stop with a reference to a "domestic processing" but was required to go further in defining the taxable event. This was necessary both to avoid doubt as to the processing which should be taxed and, equally important, to make it plain that the same oils should not be subjected to tax on each successive stage of domestic processing. Congress supplied this necessary part of the definition not, as we have seen, by referring to a particular physical opera-

tion, but by the use of the word "first." In this context, the natural and reasonable meaning of "first" is the "first" of those domestic processings all of which might otherwise have been considered taxable. Thus, the use of the word "first" singles out the particular taxable processing from among those *occurring after the effective date of the Act.*

There can be no question that the language so adopted serves the dual purpose referred to. It designates an immediately identifiable processing; it effectively disclaims any intention to tax successive processing of the same oil. Here, then, is the plain and obvious reason for the use of the word "first." Under the rule of prospective operation, "first domestic processing" means the first domestic processing occurring after the effective date of the Act. The designation "first" exhausts its purpose when it has identified the particular taxable operation. If Congress had intended to attach some additional condition or qualification to the taxable event, such as a provision that the oils must not have received a domestic processing before the effective date of the Act, it would presumably have used express language manifesting this intention.

(2) That the taxable event is simply the first domestic processing after the effective date of the Act, is strongly confirmed by the unusual phrasing "*previous first* domestic processing" (italics supplied), which appears in the first sentence of

Section 602½ in connection with the reference to combinations or mixtures. The first sentence of Section 602½, as we have seen, imposes a tax upon the "first domestic processing" not only of the designated oils, but also—

> of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, * * *.

The same expression "previous first domestic processing" is repeated, in similar context, in the second sentence of Section 602½, which imposes an additional tax upon non-Philippine coconut oil. The unusual sequence "previous first" is strongly persuasive that "first domestic processing" has a point of reference other than first in time. If "first domestic processing" simply meant first in time, the expression "previous first" would be tautological, for the first processing in point of time would necessarily have been a "previous" processing. The insertion of "first" following "previous" necessarily indicates that "first domestic processing" is not used in what may be called its literal sense of first in time, but is used, instead, in a *statutory* sense peculiar to the context in which it is found.

A more detailed examination of the provisions in which "previous first domestic processing" appears affords compelling support to the view

that "first domestic processing" is used in a special statutory sense to tax all first domestic processings occurring after the effective date of the Act, regardless of previous domestic processings. Oil in combinations or mixtures is relieved from the tax not where it has received a *previous* domestic processing but only where it has received a *previous first* domestic processing. A category of previous domestic processings would be all-inclusive and would comprehend all prior domestic processings. It would serve to free from the tax oil which had received any prior domestic processing, whether or not a tax had been paid with respect to it. The category established, of previous *first* domestic processings, is narrower and must refer only to previous domestic processings occurring after the effective date of the Act, without regard to domestic processings prior to that date. Hence, oil in combinations or mixtures is taxed, notwithstanding any number of times it may have been previously processed, unless it has undergone a previous *taxable* processing. Previous "first domestic processing," as applied to oil in combinations or mixtures, means first domestic processing occurring after the effective date of the Act, without regard to processings prior to that date.

There is, in turn, no reason to believe that "first domestic processing" as applied to oil in combinations or mixtures means anything different

from what it does in the first two lines of the statute in imposing the tax on oils outside of combinations or mixtures. On the contrary, the evident purpose of the provision as to combinations or mixtures is to treat the taxable oils in combinations or mixtures precisely the same as when uncombined with other substances. A processor cannot escape the tax because the taxable oil is combined or mixed with other substances; on the other hand, the combination or mixture should not be taxed merely because it contains one of the designated oils unless the processing of the designated oil would itself be subject to tax. Accordingly, as applied to oils both in and out of combinations or mixtures, "first domestic processing" means the first domestic processing after the effective date of the Act, without regard to prior processings. See discussion by Judge Chase in the *Loose-Wiles* case, 95 F. 2d at p. 440.

Precisely the same end is reached by a somewhat different approach. However the taxable event is to be defined, it is manifest that every statutory "first domestic processing" of the designated oils is taxable, for the tax is expressly imposed upon their "first domestic processing." Whatever canons of statutory construction are to be invoked, the "first domestic processing" of the specified oils must be defined in terms of a taxable event. Oils in combinations or mixtures are sub-

jected to the tax where there has been no "previous first domestic processing" with respect to them. Therefore, whatever the definition of "first domestic processing," oils in combinations or mixtures must pay a tax upon the first domestic processing of the combination or mixture unless they have previously paid their way. Under the statutory language as to combinations or mixtures, whether such oils had been domestically processed once, twice or fifty times prior to the effective date of the Act would be immaterial; only a previous taxable "first domestic processing" suffices to relieve them of the tax. But there is no reason, as we have seen, to believe that oils in combinations or mixtures are treated any differently from other oils. The purpose of the statute, on the contrary, is to put them all on a parity. The only tenable conclusion is that they all are treated just the same. As to all of the oils, in or out of combinations or mixtures, the first domestic processing after the effective date of the Act is taxable, without regard to prior processings.

(3) The taxpayer's argument is constructed on the theory that the "first domestic processing" of the designated oils is not necessarily a taxable event. It insists that the statute recognizes two distinct classes of first domestic processings—one class, occurring prior to the effective date of the Act, which is not taxed, and a second class, occur-

ring after the effective date of the Act, which is taxed. (Pet. Br. 9–15, 54–55.) It is only on this basis that the taxpayer attempts to explain away the force of the 1936 amendment, which we discuss, *infra*, pp. 32–37. Fundamental to the taxpayer's theory, also, is the contention that the "ordinary," "normal," and "literal" meaning of "first" should be employed. (Pet. Br. 9–10.) But the foregoing is inconsistent with the taxpayer's basic position that "first domestic processing" cannot be taken so literally as to refer to a taxable operation occurring prior to the Act (Pet. Br. 60). Accordingly, the taxpayer could hardly mean that the statutory "first domestic processing" includes a first domestic processing in point of time, which may have occurred prior to the effective date of the Act, for this would immediately raise the question whether the statute was intended to be retrospectively applied, and the taxpayer certainly does not concede that it should be. Hence, it seems to follow that both parties must agree that the statutory "first domestic processing" refers only to first domestic processings occurring after the effective date of the Act, and that, in truth, neither contends for the "ordinary," "normal," or "literal" meaning of "first." The taxpayer, unlike the Government, would add the condition that the first domestic processing occurring after the effective date of the Act must also be the first in point of time without regard to the effective date.

The question, therefore, is not whether the so-called "literal" meaning of "first" should be adopted but whether there is anything in the statute which conflicts with the application of the tax, without additional qualification, to the first domestic processings occurring after the effective date of the Act. The statute will be searched in vain for any such contradiction. On the contrary, the last part of the second sentence of Section 602½ (a) points in the same direction as the remainder of the section. That sentence expressly excludes from the additional tax of two cents per pound coconut oil which (a) is wholly the production of the Philippine Islands or other possessions of the United States; (b) was produced wholly from materials grown or produced in the Philippine Islands or other possessions of the United States; (c) was brought into the United States on or before the thirtieth day after the enactment of the Act, or produced from materials brought in on or before the thirtieth day after the enactment of the Act; or (d) was purchased under a bona fide contract entered into prior to that date. These exclusions from the imposition of the additional tax of two cents per pound are clear and precise, and it is reasonable to assume that had Congress intended to exclude from the operation of the basic tax oils which had been subjected to nontaxable domestic processing prior to the effective date of the Act, it would have

unambiguously expressed its intent in similar terms.

(4) Section 602½ is not only a revenue measure but was also intended to protect the use of domestic fats and oils by neutralizing the competitive advantage assertedly enjoyed by foreign oils.[4] It is apparent that these purposes would be substantially thwarted if, under the taxpayer's construction, the large quantities of oils on hand in this country which had received one or more domestic processings prior to May 10, 1934, were permitted to escape taxation upon subsequent processing. The collection of revenue would assuredly suffer and, likewise, the protection of domestic fats and oils would be postponed until such time as the existing quantities of domestically processed foreign oils were consumed. That the quantities of previously processed foreign oils on hand were substantial and that, under the taxpayer's construction, there would have been a marked delay in the effective operation of Section 602½ is indicated by the present case. As late as January 1937, the taxpayer was still processing oils which had received one or more previous domestic processings prior to May 10, 1934.

The taxpayer contends that domestic fats and oils could not, in any event, secure protection

[4] See the statement of Mr. Shallenberger explaining the reasons for the tax. Cong. Rec. Vol. 78, Part 3, pp. 2528–2530.

against foreign oils already in this country on May 10, 1934, and previously domestically processed. The taxpayer argues (Br. 36) that to—

> the extent of his current supply of processed oils on hand the domestic manufacturer was not a potential customer for domestic fats and oils as substitute raw materials.

But if this proves anything it proves too much. If the current supply of domestically processed foreign oils on hand would continue to displace domestic fats and oils, so likewise would the current supply of nonprocessed foreign oils. Accordingly, on the taxpayer's reasoning it was futile for Congress to impose a tax with respect to the first domestic processing after the effective date of Section 602½ of *any* foreign oils then in the hands of domestic manufacturers, whether previously domestically processed or not.

The probable and reasonable view which Congress held, we believe, is that immediately upon the enactment of Section 602½ the competitive advantage of foreign oils would be effectively dissipated, on the condition, that is, that all such foreign oils should be taxed on subsequent processing. The ultimate consumer no less than the domestic manufacturer was a potential customer for domestic fats and oils. Despite his current supply of foreign oils the domestic manufacturer would be required to meet competitive conditions as they developed and if another manufacturer,

not stocked up with foreign oils, was able to outsell him by the use of domestic fats and oils, he would be required to handle increasing quantities of the domestic products. The supply of foreign oils already in this country would be directed of necessity into the restricted usages for which domestic fats and oils by their nature could not provide a satisfactory substitute. The view of the operation of economic laws asserted by the taxpayer would seem to apply only if all domestic manufacturers were currently stocked up with foreign oils, and, by concerted action, agreed to handle no domestic fats and oils until the foreign stocks had been sold. It seems unlikely that Congress would make this assumption.

It is an assumption, moreover, which Congress refrained from making when it enacted the amendments to Section 602½ provided by Section 702 of the Revenue Act of 1936 (Appendix, *infra*, pp. 41–42). By those amendments, Congress extended the processing tax to include the independent processing of the fatty acids and salts of certain of the taxable oils. We discuss those amendments in some detail, *infra*, pp. 32–37. Suffice it to point out at present that by the terms of the amendments the fatty acids and salts were subjected to a tax upon their "first domestic processing" following the effective date of the amendments, *without regard to the number of prior domestic processings, unless a tax had previously been paid with respect to them.* By this treatment of the newly

taxed fatty acids and salts Congress manifested an understanding of the purposes of the processing tax and of the operation of economic laws wholly contrary to that asserted by the taxpayer.

A revenue statute, like any other act, should be given a reasonable construction and not one that is objectionable in its practical and equitable effects. The taxpayer's construction, furthermore, would violate this principle and would result in serious inequities between domestic processors, as the following illustration will show: Suppose that domestic processors A and B each had on hand on May 9, 1934, 100,000 pounds of coconut oil; that A was able to subject his stock to a neutralizing process on or prior to that date; that B's stock had already been neutralized prior to importation but that he was unable further to process it before May 10, 1934, the effective date of the Act; and that both processors performed the identical operation of bleaching their respective stocks subsequent to May 10, 1934. Under the taxpayer's construction, processor B in these circumstances would be required to pay the tax for performing the identical operation which was performed by A, but A would escape the tax. This application would obviously give A a substantial competitive advantage over B—and an advantage which on any view finds no basis in the purposes of the Act. The proper construction, on the contrary, would place all domestic processing occurring after the effective date of the section on the same competi-

tive level and processors A and B would each be taxed.[5]

(5) The taxpayer contends that "first domestic processing" in this statute should receive the same interpretation as under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, where the Treasury had construed that term as meaning the first domestic processing in point of time. But the Agricultural Adjustment Act, unlike the present statute, provided in Section 16 (a) for a floor-stocks tax, applicable to articles "processed wholly or in chief value from any commodity with

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[5] Apart from what has already been said, the legislative history of Section 602½ throws no important additional light on the meaning of "first domestic processing." The House Report (H. Rep. No. 704, 73d Cong., 2d Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 554, 585), referring to the provision as to combinations or mixtures, stated:

> To prevent avoidance of the tax by the performance of preliminary processing outside of the United States, the tax is likewise imposed upon the first processing in the United States of mixtures or combinations in chief value of coconut oil or sesame oil, or of both oils.

This statement appears to attribute too narrow a scope to the provision as to combinations or mixtures since, on any view, the provision serves to prevent avoidance of the tax whether or not there has been a preliminary processing of the constituent oil outside the United States. At the same time, it is of some significance that the statement contrasts processings outside and within the United States and assumes that the latter are taxable. The Senate Report (S. Rep. No. 558, 73d Cong., 2d Sess., p. 52 (1939–1 Cum. Bull. (Part 2) 586, 625), contains no similar statement. Nor is the Conference Report further enlightening. H. Conference Rep. No. 1385, 73d Cong., 2d Sess., pp. 29–30 (1939–1 Cum. Bull. (Part 2) 627, 638).

respect to which a processing tax" was levied, and held for "sale or other disposition" at the time a processing tax went into effect. The expression "sale or other disposition" was interpreted by the Commissioner of Internal Revenue to include "held by any person other than an ultimate consumer for processing or use in manufacture or production." Treasury Regulations 82, Article 1 (*i*). In consequence, articles wholly processed and held for sale at the effective date of a tax under that Act and also articles held for further processing at that date were subjected to the floor-stocks tax. The presence of the floor-stocks tax provision manifested a plain intention not to apply the processing tax, provided in Section 9 (a), to such articles, for to have done so would have amounted to double taxation of the same commodity. T. D. 4403, X11-2 Cum. Bull. 430 (1933) (Pet. Br. 17-18), shows the complementary relationship of the processing tax and the floor-stocks tax under that Act. The Commissioner's interpretation of "first domestic processing" under the Agricultural Adjustment Act was thus required by reasons peculiar to that Act, not present with respect to Section 602½.[6]

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[6] It should also be noted that the Agricultural Adjustment Act, unlike Section 602½, did not use the expression "previous first domestic processing."

The relationship of Section 602½ and the Agricultural Adjustment Act was considered at length by the court below, the conclusion being (R. 33) that the two statutes were not in *pari materia*.

This does not mean that the construction of Section 602½ for which the Government contends results in practical effect in a floor-stocks tax. A prime purpose of the floor-stocks tax provided in Section 16 (a) of the Agricultural Adjustment Act was to reach articles wholly processed at the effective date of that Act. The Government does not contend that the instant tax so applies and no question of this nature is presented here.

We submit, therefore, that "first domestic processing" as used in Section 602½ refers to the first domestic processing of the designated oils occurring after the effective date of that section, without additional qualification, and that this follows from the text and purposes of the section considered in relation to the subject matter with which Congress dealt.

B. The application of the Treasury Regulations

Treasury Regulations 48, promulgated August 17, 1934, interpret "first domestic processing" to mean "first use in the United States on or after the effective date of the Act."[7] In respect likewise of many other provisions of the statute concerning these oils, the Regulations spell out in detail the application of the tax and the method of its collection (Appendix, *infra*, pp. 45–50). The Regulations were issued under Section 1101

[7] This provision appears in the amended Regulations as Article 1 (n) (Appendix, *infra*, p. 47). It appeared in the original Regulations as Article 1 (1).

of the Revenue Act of 1926, c. 27, 44 Stat. 9, which was made applicable by Section 602½ (f) of the Revenue Act of 1934. Section 1101 requires the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to publish all needful rules and regulations for the enforcement of that Act. As in other cases, the Regulations thus presented "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly" while they were "yet untried and new" (*Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315).

Except as to the stocks of oil already in this country, which had previously received one or more domestic processings, the identity of the taxable event raises no question of the character here presented. We have seen from an examination of the provisions and purposes of the statute and the subject matter with which it deals that Congress intended to make no exception in the case of stocks of oil on hand which had previously received one or more domestic processings. Even if the statute were less clear in this regard, the Regulations should serve to resolve any residual doubt. In the narrow field of its application to the stocks of oil already on hand, the statute, if doubt or ambiguity exists, would seem to be peculiarly susceptible to administrative construction. In such circumstances, the contempora-

neous and consistent administrative construction of a statute by the officials charged with its application is entitled to great weight and will be overturned only for the most cogent reasons. *Edward's Lessee* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Moore*, 95 U. S. 760, 763; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Norwegian Nitrogen Co.* v. *United States*, *supra*; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100, 101–103, rehearing denied, 308 U. S. 638; *White* v. *Winchester Club*, 315 U. S. 32, 41.

On the facts of the present case, the Regulations are entitled to even greater weight. Since the promulgation of the Regulations Congress, on one occasion, in 1935, has enacted legislation directly relating to the oils designated in Section 602½, and on five occasions, in 1936, 1938, 1941, and twice in 1942, has amended Section 602½ or its corresponding provisions in the Internal Revenue Code without any indication of disapproval of the Regulations (Appendix, *infra*, pp. 40–45). The 1936 amendment is particularly significant since Congress at this time reviewed the status of the oils, added the fatty acids and salts of certain of the oils to the taxable list, and eliminated the tax with respect to sunflower oil and sesame oil, except as imported prior to the

effective date of the amendment. As so amended and reenacted, the tax continues to be imposed upon the "first domestic processing." It seems unlikely that Congress in so overhauling Section 602½ and in subjecting new articles, including stocks already in this country, to the tax would have failed to examine the Regulations with respect to their treatment of the stocks of oil in this country under Section 602½ as originally enacted. There is affirmative indication, indeed, that the Regulations were examined, for the Senate report on the 1936 amendment expressly refers to the pertinent provision in connection with the definition of combination or mixture (S. Rep. No. 2156, 74th Cong., 2d Sess., p. 30 (1939–1 Cum. Bull. (Part 2) 678, 698)).* Nor can it be doubted that Congress would have voiced its disapproval of the Regulations had it in fact disagreed with them. There is thus presented an appropriate case for the application of the rule that where Congress amends or reenacts a statute without change of particular language following administrative construction of it, such action in the absence of persuasive indication to the contrary may be regarded as confirmation and approval of the meaning attributed to the statute. *National Lead Co.* v. *United States,* 252 U. S.

* The reference is to Article 1 (g) of the original Regulations, which defined a combination or mixture to include at least 10% of one of the taxable oils. This provision appears in the amended Regulations as Article 1 (g) (3).

140, 146; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Burnet* v. *Thompson Oil & G. Co.*, 283 U. S. 301, 307–308; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466–467; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Morgan* v. *Commissioner*, 309 U. S. 78, 81; *Reinecke* v. *Smith*, 289 U. S. 172, 175. See *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100, rehearing denied, 308 U. S. 638; *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. 2d 438, 440–441 (C. C. A. 2d), certiorari denied, 305 U. S. 611.

It is unimportant under the decisions that the statute should be reenacted without change. It is of significance only that the statute should be left "without material change" (*United States* v. *Dakota-Montana Oil Co., supra; Helvering* v. *Wilshire Oil Co., supra*), or should be "substantially" reenacted (*Helvering* v. *Winmill, supra*). Logically, indeed, amendment of the statute or reenactment with some changes, so long as the language in controversy is not disturbed, would seem to be more persuasive than reenactment without any change whatsoever; for it provides affirmative indication that Congress has reconsidered the section and, only after such reexamination, has decided that the crucial text should be left unchanged. Similarly, in principle and under the decisions, reenactments or amendments after the taxable year are as significant as a reenactment by the statute governing

the taxable year. *Brewster* v. *Gage, supra; Burnet* v. *Thompson Oil & G. Co., supra; Mass. Mutual Life Ins. Co.* v. *United States, supra; Reinecke* v. *Smith, supra.*[9]

The taxpayer nevertheless denies the applicability of the reenactment rule as applied to the 1936 amendment, contending that it fails to indicate Congressional approval of the Regulations and, on the contrary, affirmatively discloses disapproval. As enacted, the 1936 amendment provided as follows:

> SEC. 702. PROCESSING TAX ON CERTAIN OILS.
> (a) The first sentence of section 602½ of the Revenue Act of 1934 is amended to read as follows:

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[9] The so-called reenactment rule has been stated in varying terms and has been applied in the absence of any affirmative indication that the pertinent administrative construction had been called to the attention of Congress. So applied, the reenactment rule has evoked considerable criticism in that it is assertedly unrealistic to suppose that Congress does or can examine into the administrative construction of every provision which it may reenact as a part of a general revenue measure. See, *e. g., F. W. Woolworth Co.* v. *United States*, 91 F. 2d 973, 976 (C. C. A. 2d), certiorari denied, 302 U. S. 768; Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, in Studies in Federal Taxation (Third Series, 1940) 420, 426–437; Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate and Gift Taxes*, 88 Univ. of Pa. L. Rev. 556, 559–565 (1940); Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 399–404 (1941). But such criticism, as these commentators recognize, is inapplicable to a case such as the present, where there is not only reason to believe that the Regulations would have been called to the attention of Congress, but affirmative indication in a committee report that they were examined.

"(a) There is hereby imposed upon the *first domestic processing* of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts, a tax of 3 cents per pound to be paid by the processor, but the tax under this section shall not apply (1) with respect to any fatty acid or salt resulting from *a previous first domestic processing taxed under this section* or upon which an import tax has been paid under section 601 (c) (8) of the Revenue Act of 1932, as amended, or (2) with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been *a previous first domestic processing* or upon which an import tax has been paid under such section 601 (c) (8)."

(b) Notwithstanding the provisions of subsection (a) of this section, the *first domestic processing* of sunflower oil or sesame oil (or any combination or mixture containing a substantial quantity of sunflower oil or sesame oil), if such oil or such combination or mixture or such oil contained therein was imported prior to the effective date of this title, shall be taxed in accordance with the provisions of section 602½ of the Rev-

> enue Act of 1934 in force on the date of the enactment of this Act. [Italics ours.]

The taxpayer contrasts "a previous first domestic processing taxed under this section" in clause (1) of paragraph (a) of the amendment with "a previous first domestic processing" in clause (2) of the same paragraph. From the difference in phraseology, the taxpayer argues that Congress recognized two categories of "previous first" domestic processings, one taxable and one not taxable. This, it is urged, shows that Congress in the original Section 602½, as well as in the 1936 amendment, did not regard a "previous first domestic processing" as necessarily occurring after the effective date of the statute and, therefore, subject to tax. Since our construction of the statute places the latter interpretation on the expression, the taxpayer concludes that Congress has here voiced disapproval of that construction, as embodied in the Regulations.

It should be noted, at the outset, that the language concerning which the taxpayer raises the dispute does not appear in Section 702 (b) of the 1936 amendment. It seems strange that had Congress meant to disapprove the Regulations as applied to the "first domestic processing" by the language in question, it would have failed to use any such disapproving language in continuing the tax with respect to the "first domestic processing" of sunflower oil and sesame oil already in this country. An examination of Section 702 (a) will

show that there is no such inconsistency in treatment.

The purpose of clauses (1) and (2) in paragraph (a) of the amendment is to prevent double taxation of the same fatty acid, salt, or oil. This, as we have seen, *supra*, p. 17, was the like purpose of the similar proviso in the original Section 602½ as to oil in combinations or mixtures. In connection with this amendment, Congress has gone even further to remove any possible doubt. The 1936 amendment originated in the Senate and the Senate Finance Committee in reporting out the amendment expressly stated that this provision, in its original version, was inserted "in order to avoid double taxation." S. Rep. No. 2156, 74th Cong., 2d Sess., p. 30 (1939–1 Cum. Bull. (Part 2) 678, 698). When the bill went to conference, the conferees amended the section so that it read as finally adopted. The Conference Report on the Revenue Act of 1936 (H. Conference Rep. No. 3068, 74th Cong., 2d Sess.), unlike the usual Conference Report, does not contain a statement on the part of the managers of either the House or the Senate explanatory of Conference amendments. The sole explanation concerning the exclusionary provisions of Section 702 is that contained in the Senate Report referred to, and that purpose was to avoid double taxation. Furthermore, a comparison of the amendment as passed by the Senate (H. R. 12395, 74th Cong., 2d

Sess., Sec. 702) (Pet. Br. 53), and as it was finally enacted, after the Conference changes, confirms this purpose. The Senate version was defective because it did not exclude from the tax the independent processing of fatty acids and salts which had resulted from a previous taxable processing of the oils. This problem arose because as applied to the oils, from which the fatty acids and salts were derived, the tax had already been in effect some two years, and a tax paid on the oils would necessarily have included within its measure the constituent fatty acids and salts. In the interest of avoiding double taxation, the amendment as finally adopted made an express exception in such cases.

It thus seems clear that the phrase "taxed under this section," as it appears in clause (1) of paragraph (a) of the amendment, was inserted merely out of an abundance of caution, to make clear beyond any possible dispute that the statutory "first domestic processing" is a taxable processing. This is so for three distinct reasons:

(1) The purpose of the exclusionary clauses is "to avoid double taxation," not to avoid taxation entirely. Hence the previous first domestic processings referred to in both of these clauses must mean previous *taxable* domestic processings.[10]

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[10] It may also be noted that the alternative condition under both clauses which frees the oil, fatty acid or salt from the processing tax is the payment of an import tax under Section 601 (c) (8).

(2) Even on the taxpayer's view, the domestic processing of a fatty acid or salt occurring after the 1936 amendment would not escape taxation unless a prior tax had been paid with respect to that fatty acid or salt. Yet the same fatty acid or salt, under clause (2), would escape taxation when domestically processed after the 1936 amendment if combined or mixed with some other product, even though no prior tax had been paid on the fatty acid or salt (Pet. Br. 58–59). Since the taxpayer does not, and cannot, deny that the provision as to combinations or mixtures was inserted to prevent avoidance of the tax, Congress on its construction would have squarely defeated that very purpose. This strange result is necessarily reached if the taxpayer's construction is followed. Under the proper view, both clauses (1) and (2) refer to a taxable processing; hence, the fatty acids, salts and oils, whether in or out of a combination or mixture, are treated exactly the same.

(3) As we have seen (*supra,* pp. 18–19) under both the Government's and the taxpayer's position, when properly analyzed, "first domestic processing," however defined, must mean a taxable domestic processing. Under both views, therefore, the phrase "taxed under this section" was inserted merely by way of description and explanation, to avoid any possible misunderstanding.

Accordingly, even if the statute were far less clear than we believe to be the case, the Regula-

tions should be given effect and the tax should be collected on the first domestic processing occurring after the effective date of the Act, without further qualification.

CONCLUSION

For these reasons the judgments of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1943.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 602½. PROCESSING TAX ON CERTAIN OILS.

(a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernal* oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sentence) a tax of 2 cents per pound, to be paid by the processor, upon the first domestic processing of coconut oil or of any combination or mixture containing a substantial quantity of coconut oil with respect to which oil there has been no previous first domestic processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such coconut oil (whether or not contained in such a combination or mixture), (A) is wholly the production of the Philippine Islands or any other possession of the United States, or (B) was produced wholly from materials the growth or production of the Philippine

*So in original.

Islands or any other possession of the United States, or (C) was brought into the United States on or before the 30th day after the date of the enactment of this Act or produced from materials brought into the United States on or before the 30th day after the date of enactment of this Act, or (D) was purchased under a bona fide contract entered into prior to April 26, 1934, or produced from materials purchased under a bona fide contract entered into prior to April 26, 1934. All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For the purposes of this section the term "first domestic processing" means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate.

* * * * * *

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 402. COMPENSATORY TAX ON PRODUCTS OF CERTAIN OILS.

During any period after the thirtieth day after the date of the enactment of this Act when—

(1) a processing tax is in effect under section 602½ of the Revenue Act of 1934, or

(2) an import tax is in effect under section 601 (c) (8) of the Revenue Act of 1932, as amended,

there is hereby imposed upon any article (not within the scope of either such tax) manufactured or produced wholly or in chief value from any one or more of the oils subject to either such tax, when such article is imported into the United States from any foreign country or from any possession of the United States or from the high seas, a compensatory tax equivalent to the tax which would be payable under such section 602½ or 601 (c) (8) upon such oil or oils if imported into the United States or if processed in the United States. The tax imposed by this section shall be levied, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930, and shall be treated, for the purposes of all provisions of law (except section 336 of such Act) not inconsistent with this section, as a duty imposed by such Act. All taxes collected under this section on account of coconut oil produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this section.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 702. PROCESSING TAX ON CERTAIN OILS.

(a) The first sentence of section 602½ of the Revenue Act of 1934 is amended to read as follows:

"(a) There is hereby imposed upon the first domestic processing of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts, a tax of 3 cents per pound to be paid by the processor, but the tax under this section shall not apply (1) with respect to any fatty acid or salt resulting from a previous first domestic processing taxed under this section or upon which an import tax has been paid under section 601 (c) (8) of the Revenue Act of 1932, as amended, or (2) with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been a previous first domestic processing or upon which an import tax has been paid under such section 601 (c) (8)."

(b) Notwithstanding the provisions of subsection (a) of this section, the first domestic processing of sunflower oil or sesame oil (or any combination or mixture containing a substantial quantity of sunflower oil or sesame oil), if such oil or such combination or mixture or such oil contained therein was imported prior to the effective date of this title, shall be taxed in accordance with the provisions of section 602½ of the Revenue Act of 1934 in force on the date of the enactment of this Act.

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 703. EXEMPTION OF PALM OIL AND PALM OIL RESIDUE FROM PROCESSING TAX.

Effective July 1, 1938, section 602½ (a), as amended, of the Revenue Act of 1934 (relating to the processing tax on certain oils) is amended by striking out "but does not include the use of palm oil in the manufacture of tin plate" and inserting in lieu thereof "but does not include the use of palm oil in the manufacture of tin plate or terne plate, or any subsequent use of palm oil residue resulting from the manufacture of tin plate or terne plate".[10]

Revenue Act of 1941, c. 412, 55 Stat. 687:

SEC. 561. PAYMENT OF PROCEEDS OF PROCESSING TAX TO GUAM AND AMERICAN SAMOA.

(a) *Payment to possessions.*—Chapter 21 of the Internal Revenue Code (relating to processing tax on oils) is amended by adding at the end thereof the following new section:

"SEC. 2483. All taxes collected under this chapter with respect to coconut oil wholly of the production of Guam or American Samoa or produced from materials wholly of the growth or production of Guam or American Samoa, shall be held as separate funds and paid to the Treasury of Guam or American Samoa, respectively. No part of the money from such funds shall be used, directly or indirectly, to pay a subsidy to the producers or processors of copra, coconut oil, or allied products,

[10] Section 602½ of the Revenue Act of 1934, as amended, was carried into the Internal Revenue Code as Sections 2470–2482. (U. S. C., Title 26, Sec. 2470–2482.)

except that this sentence shall not be construed as prohibiting the use of such money, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, for the acquisition or construction of facilities for the better curing of copra or for bona fide loans to copra producers of Guam or American Samoa."

(b) *Effective date of amendment.*—The amendment made by this section shall be applicable only with respect to taxes collected after the date of enactment of this Act. (U. S. C., Supp. I, Title 26, Sec. 2483.)

Act of September 16, 1942, c. 560, 56 Stat. 752:

That section 2470 (a) (2) of the Internal Revenue Code is hereby suspended: *Provided,* That if the President after receipt by him of a request from the Government of the Commonwealth of the Philippine Islands that the suspension of section 2470 (a) (2) be terminated, shall find that adequate supplies of copra, coconut oil, or both, the product of the Philippine Islands, are readily available for processing in the United States, he shall so proclaim; and thirty days after such proclamation, the suspension of section 2470 (a) (2) of the Internal Revenue Code, shall terminate.

SEC. 2. This Act shall become effective the day following its enactment, and shall terminate on June 30, 1944. (U. S. C., Supp. II, Title 26, Sec. 2470.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 621. EXEMPTION FROM PROCESSING TAX OF PALM OIL USED IN MANUFACTURE OF IRON OR STEEL PRODUCTS.

Section 2477 (relating to definition of first domestic processing) is amended to read as follows:

"SEC. 2477. FIRST DOMESTIC PROCESSING DEFINED.

"For the purposes of this chapter, the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of iron or steel products, or tin plate or terne plate, or any subsequent use of palm oil residue resulting from the manufacture of iron or steel products, or tin plate or terne plate."

Treasury Regulations 48, promulgated August 17, 1934:

ART. 1 (as amended by T. D. 4695, XV-2 Cum. Bull. 324 (1936)). *Definitions.*—when used in these regulations, the term—

* * * * * *

(*l*) *Processing* means the use of the oil or oils in the manufacture or production of an article intended for sale.

(*m*) *Use* has a very broad meaning. The term includes, among other things, the using or making use of, or employing, any one or more of the oils, or any combination or mixture of the oils, in any process, or stage or step in the manufacture or production of an

article intended for sale, and includes the manufacture or production of such article in its entirety, whether such oil is used as a component or constituent or ingredient of the article, or is used merely as a means or aid in the manufacture or production of the article, and not as a component or constituent or ingredient. Examples which are in no measure all-inclusive of the *use* contemplated are:

(1) Bleaching, neutralizing, refining, deodorizing, hydrogenating, sulphonating, "twitchellizing," polymerizing, saponifying, or any other commercial processing or any combination of these commercial processings, if such process or combination of processes produces an article intended for sale.

(2) The entire process of manufacture or production of an article intended for sale, where any one or more of the above-enumerated processes are but incidental steps or stages in the continuous course of manufacture or production of the article.

(3) The manufacture or production of an article intended for sale from an oil or oils upon which any of the processes enumerated in (1), above, have been performed either (A) prior to the importation of the particular oil, or (B) prior to the effective date of the Act.

(4) (as further amended by T. D. 4817, 1938–1 Cum. Bull. 522, and by T. D. 5179, 1942–2 Cum. Bull. 292) The use of the oil or oils in connection with any process or stage of the manufacture or production of an article intended for sale, even though the oil is not consumed therein or does not become a component material of the article so produced. The tax does not apply to the use of palm oil, (1) in the manufacture of tin plate, (2) on or after July 1, 1938, in the manu-

facture of terne plate, or (3) on or after November 1, 1942, in the manufacture of iron or steel products. Likewise the tax does not apply to any use on or after July 1, 1938, of palm oil residue resulting from the use of such oil in the manufacture of tin plate, or terne plate, or to any use on or after November 1, 1942, of palm oil residue resulting from the use of such oil in the manufacture of iron or steel products.

(*n*) *First domestic processing* means the first use in the United States on or after the effective date of the Act. At all times in these regulations, the term *processing* or *first domestic processing* will be deemed to be synonymous with "use" or "first use in the United States on or after the effective date," respectively, and will include the meanings implied in the latter terms by subdivision (*m*), above.

* * * * *

ART. 3 (as amended by T. D. 4695, *supra*). *Imposition of the tax.*—(*a*) *For the period 11.40 a. m., eastern standard time, May 10, 1934, to 12 midnight, eastern standard time, August 20, 1936.*—During the period 11.40 a. m., eastern standard time, May 10, 1934, to 12 midnight, eastern standard time, August 20, 1936, tax is imposed on the first domestic processing of coconut oil, palm oil, palm kernel oil, sesame oil, sunflower oil, or any combination or mixture of such oils.

(*b*) *For the period beginning with 12.01 a. m., eastern standard time, August 21, 1936.*—Beginning with 12.01 a. m., eastern standard time, August 21, 1936, tax is imposed on the first domestic processing of coconut oil, palm oil, palm kernel oil, fatty acids and salts derived from such oils as well as combinations or mixtures of such oils,

fatty acids, or salts. However, tax shall not be imposed on any fatty acid or salt (1) resulting from a first domestic processing of coconut oil, palm oil, or palm kernel oil upon which tax has been paid under section 602½ of the Revenue Act of 1934, as amended, or (2) upon which an import duty has been paid under section 601 (c) 8 of the Revenue Act of 1932, as amended.

Beginning with 12.01 a. m., eastern standard time, August 21, 1936, no tax shall be imposed with respect to a combination or mixture of coconut oil, palm oil, palm kernel oil, fatty acid, or salt of such oils where such oil, fatty acid, or salt has (1) previously been subjected to tax under section 602½ of the Revenue Act of 1934, as amended, or (2) been subjected to the import tax imposed under section 601 (c) 8 of the Revenue Act of 1932, as amended.

The tax shall apply to sesame oil, sunflower oil, or any combination or mixture of sesame oil or sunflower oil, if such oil, combination or mixture, or the oil contained in such combination or mixture was imported prior to 12.01 a. m., eastern standard time, August 21, 1936.

* * * * * *

ART. 4 (as amended by T. D. 4695, *supra*). *When tax attaches.*—(*a*) *Generally.*—The tax attaches upon the first domestic processing of the oil. If some part of the processing of a particular quantity of oil takes place on or after the effective date, the tax attaches notwithstanding that some part of the processing of such quantity took place before the effective date.

(*b*) *For the period 11.40 a. m., eastern standard time, May 10, 1934, to 12 midnight, eastern standard time, August 20, 1936.*—If coconut oil, palm oil, palm kernel oil, sesame oil, sunflower oil, or a combination or mixture of such oils, has been refined, sulphonated, sulphated, hydrogenated, or otherwise processed, either prior to the importation thereof or prior to 11.40 a. m., eastern standard time, May 10, 1934, or both, the tax attaches to the first domestic processing of such oils, or combinations or mixtures, after such time, in the manufacture or production of an article intended for sale.

(*c*) *For the period beginning with 12.01 a. m., eastern standard time, August 21, 1936.*—Beginning with 12.01 a. m., eastern standard time, August 21, 1936, the tax will attach to the first domestic processing of coconut oil, palm oil, palm kernel oil, fatty acids and salts derived from such oils as well as combinations or mixtures of such oils, fatty acids, or salts.

The tax attaches to sesame oil or sunflower oil, or a combination or mixture of such oils, imported prior to 12.01 a. m., eastern standard time, August 21, 1936, and first domestically processed subsequent to such time.

However, no tax will attach to the first domestic processing of fatty acids or salts of coconut oil, palm oil, or palm kernel oil if the coconut oil, palm oil, or palm kernel oil from the first domestic processing of which the fatty acids or salts resulted, had been subjected to tax under section 602½ of the Revenue Act of 1934, as amended, or if such oils had been subjected to the

import tax imposed under section 601 (c) 8 of the Revenue Act of 1932, as amended.

No tax shall attach to a combination or mixture of coconut oil, palm oil, palm kernel oil, fatty acids or salts of such oils, where such oil, fatty acid, or salt has previously been subjected to tax under section 602½ of the Revenue Act of 1934, as amended, or been subjected to the import tax imposed under section 601 (c) 8 of the Revenue Act of 1932, as amended.

No tax shall attach to sesame oil, sunflower oil, or any combination or mixture of such oils, if such oils, combinations or mixtures, or the oils contained in such combinations or mixtures were imported subsequent to 12 midnight, eastern standard time, August 20, 1936.

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IN THE

Supreme Court of the United States

October Term, 1942

Nos. ~~907 & 908~~ 38-39

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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PETITION FOR REHEARING UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Colgate-Palmolive-Peet Company, respectfully petitions that a Rehearing be granted upon its petition for a Writ of Certiorari to review the judgments of the United States Circuit Court of Appeals for the Third Circuit entered in the above cases affirming the judgments of the United States District Court for the District of Delaware, on the following grounds:

One week after this Court, on May 24, 1943, denied the petition for a Writ of Certiorari in the cases at bar, the Circuit Court of Appeals for the Seventh Circuit on June 1, 1943 rendered a decision in the case of *Durkee Famous Foods, Inc.* v. *Carter H. Harrison*, Appeal No. 8171, which is squarely in conflict with the decision of the Court below in

the cases at bar. It is likewise in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Loose-Wiles Biscuit Company* v. *Rasquin*, 95 F. (2d) 438. The opinion of the Seventh Circuit in the *Durkee Famous Foods, Inc.* case is printed in full in the Appendix.

These three decisions of Circuit Courts involve precisely the same question of law, viz., what is meant by the word "first" in Section 602½ of the Revenue Act of 1934, c. 272, 48 Stat. 680, which levies a tax upon "the first domestic processing" of certain imported oils; that is, whether the word "first" means first in fact, as the taxpayer contended in each case, or means first after the effective date of the Act, as the Treasury Regulation provides and as the Government contended in each case.

These three decisions of Circuit Courts involve identical facts. In each case the taxpayer had on hand on May 10, 1934, the effective date of the tax, certain oils which already prior to said date had been subjected in the United States to one, two, three or four separate processings, and which oils were subjected to a further processing in the United States after that date. In each case the question for the Court's determination was whether such further processing, being in fact the second, third, fourth or fifth domestic processing, was nevertheless "the first domestic processing" within the meaning of the Act. The Seventh Circuit in the *Durkee* case held that such further processing was not "the first domestic processing" and *was not taxable*. The Court below and the Second Circuit in the *Loose-Wiles* case held that such further processing *was taxable*.

The Court in the Seventh Circuit expressly declines to follow either of the two "sign posts" upon which the Court below based its decision in the cases at bar.[1] Instead the

[1] Appendix, pp. 12-15.

Court held that (a) the literal meaning of the statutory language,[2] (b) the legislative history and purpose of Section 602½ showing a Congressional intent to protect the American farmer against imports of the foreign oils and not to raise revenue,[3] (c) the fact that the tax language was derived from the Agricultural Adjustment Act and that the phrase "the first domestic processing" had already been there construed by the Treasury Department to mean the "first in fact",[4] and (d) the debates in Congress showing that "it was the intention of Congress in enacting Section 602½ to extend to the foreign oils the same type of processing tax as had already been levied upon the American farmers' products by the Agricultural Adjustment Act and to use such tax as a substitute for a protective tariff"[5] all show that Congress intended to tax only the first or earliest domestic processing in fact. The Court further found that "there is language in the [1936] amendment which we regard as inconsistent with an intention on the part of Congress to subscribe to the Regulation interpretation."[6]

The Seventh Circuit declined also to follow the *Loose-Wiles* decision, pointing out that "the Court in the Loose-Wiles case apparently gave no consideration to the legislative purpose or history of the Act, and predicated its decision on the reasonableness of the Treasury Regulation which interpreted the Act as the first domestic processing 'on and after effective date of the Act.'"[7]

The Seventh Circuit further pointed out that while the Second and Third Circuits agreed in their construction

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[2] Appendix, pp. 13, 14.
[3] Appendix, pp. 15-17, 19.
[4] Appendix, p. 17.
[5] Appendix, p. 17.
[6] Appendix, p. 20.
[7] Appendix, p. 12.

of Section 602½, there was a direct conflict in their reasoning.

> "It [the Court in the Loose-Wiles case] concluded that Congress by an amendment to the Revenue Act of 1936 approved this administrative interpretation. On the other hand, the court in the Colgate case denied the contention that Congress by the 1936 amendment had given such approval." [8]

As matters now stand, *Durkee* has a judgment for the recovery of the taxes involved in its suit, while your petitioner has been denied recovery of its taxes upon an identical state of facts. Furthermore, there is still pending in the United States District Court for the Southern District of Ohio, in the Sixth Circuit, the case of *Cincinnati Soap Company* v. *United States*, 22 F. Supp. 141, based upon the same state of facts. In that case the District Court has decided the question of law in favor of the taxpayer on demurrer and the case is awaiting trial on the merits. The prospect is that the Sixth Circuit will likewise have to pass upon this issue. According to the Government, at least three other similar claims are pending. Presumably these claims are in litigation; otherwise, the Statute of Limitations would normally have barred them. In view of the contrariety of conclusions and reasoning of the various courts which have passed upon this question, as noted in the opinion of the Seventh Circuit [9] and as pointed out in the original petition herein, we respectfully submit that this question should be reviewed and finally determined by this Court in the cases at bar.

There is now a direct conflict of decisions between the Seventh Circuit and the Court below, the conflict having

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[8] Appendix, p. 12.
[9] Appendix, p. 11.

arisen subsequent to this Court's order denying a Writ herein. In that situation, this Court has repeatedly held that such conflict so arising subsequently to the denial of a writ is sufficient ground for reconsideration and granting of the Writ. *Sanitary Refrigerator Company* v. *Winters*, 278 U. S. 587, 280 U. S. 30, p. 34; *Roberts Sash & Door Company* v. *United States*, 282 U. S. 829; *Duquesne Steel Foundry Company* v. *Burnet*, 282 U. S. 830, and *Douglas* v. *Willcuts*, 295 U. S. 722.

It is submitted that a Rehearing herein should be granted, the Court's order denying the Writ should be vacated and an order entered herein granting the Writ.

Respectfully submitted,

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Certificate of Counsel.

I, Mason Trowbridge, of Counsel for the above named petitioner, hereby certify that the foregoing petition for Rehearing is presented in good faith and not for delay.

Mason Trowbridge

APPENDIX.

OPINION OF
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, 1942, APRIL SESSION, 1943.

No. 8171.

DURKEE FAMOUS FOODS, INC., a Corporation,
Plaintiff-Appellee,

vs.

CARTER H. HARRISON, Collector of Internal Revenue for the First District of Illinois,
Defendant-Appellant.

No. 8172.

DURKEE FAMOUS FOODS, INC., a Corporation,
Plaintiff-Appellant,

vs.

CARTER H. HARRISON, Collector of Internal Revenue for the First District of Illinois,
Defendant-Appellee.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

JUNE 1, 1943.

Before SPARKS, MAJOR and KERNER, *Circuit Judges.*

MAJOR, *Circuit Judge.* These are cross appeals by Durkee Famous Foods, Inc. (hereinafter referred to as the plaintiff or taxpayer) and the Collector of Internal Revenue

for the First District of Illinois (hereinafter referred to as the defendant or government) from a judgment entered by the District Court on July 13, 1942. Two suits were instituted by plaintiff, one in July 1938 and the other in July 1940, for the recovery of taxes with respect to the processing of various oils during the period from May 1934 to January 1936, inclusive. The first suit sought recovery in the amount of $76,899.09, which was allowed by the District Court. (This suit, originally numbered 47,306, is involved in appeal No. 8171, and will be referred to here by the latter designation.) The second suit was for recovery of taxes in the amount of $90,589.98. (This suit, originally numbered 1,921, is involved in appeal No. 8172, and will be referred to here by the latter designation.)

The complaint in the second suit alleged three grounds of recovery in counts designated 1, 2 and 3. The cases were consolidated and tried by the Court. Plaintiff prevailed in appeal No. 8171, and judgment was rendered against the defendant for $76,899.09, with interest, and also prevailed as to count 1 in No. 8172 to the extent that judgment was rendered against the defendant in the amount of $10,721.41, with interest. In this case, counts 2 and 3 were dismissed. Defendant appeals from the judgment in No. 8171, and also from the judgment predicated upon count 1 in No. 8172. Plaintiff appeals from the limitation of recovery under count 1 (contending that it was entitled to recover in a greater amount), and from the dismissal of counts 2 and 3 in No. 8172.

Plaintiff, an Illinois corporation, was engaged during the period relevant to these appeals in extracting coconut oil from copra, which is the dried meat of coconuts, at its plants located in Portland, Oregon and Berkeley, California, and in the processing of coconut oil, palm kernel oil, sesame oil

and sunflower oil at its plants located in Berkeley, California, Chicago, Illinois, Norwalk, Ohio, Louisville, Kentucky, and Elmhurst, New York. Plaintiff's grounds for recovery in each of the suits involve a construction of Sec. 602½ of the Revenue Act of 1934, c. 277, 48 Stat. 680, upon which the taxes were assessed by and paid to the defendant. In No. 8171, the judgment of $76,899.09 was the total amount of taxes collected by the defendant. In No. 8172, the amount of taxes collected from plaintiff aggregated the sum of $5,374,551.15, the amount of recovery sought was $90,589.98, and judgment rendered for the plaintiff was in the amount of $10,721.41.

The parties have presented briefs and arguments as though there were two separate appeals. We shall accord like treatment, and first consider the question presented in No. 8171. The section of the Revenue Act in controversy, so far as pertinent to this appeal, provides:

> "There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm-kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. * * * For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed * * *."

On May 10, 1934, the date on which this section became effective, plaintiff had on hand in the United States 3,563,303 pounds of coconut oil, sunflower seed oil and sesame seed oil. All of such oils had been imported, and prior to said

time had been subjected in the United States to one or more of the following processings, viz., neutralizing, washing, bleaching or deodorizing, and some of the oils had been subjected to a fifth processing—hydrogenation. Between the time the Act became effective and December 1, 1935, plaintiff further processed or used said oils in the manufacture or production of an article intended for sale, and paid, under protest, with respect to said further processing or usage, the taxes, recovery for which was sought and allowed in No. 8171.

The question for decision on this appeal is dependent solely upon the construction to be given the language, "there is hereby imposed upon the first domestic processing * * *." To be more specific, what was meant by the word "first"? It is plaintiff's contention, sustained by the lower court, that a tax could be legally levied only where the "first domestic processing" took place subsequent to the effective date of the Act, and, inasmuch as all the oils here involved had been subjected to at least one processing before the date of the Act, that a subsequent processing is not within the meaning of the Act, and, therefore, not subject to the tax. On the other hand, it is the contention of the defendant that the "first domestic processing" means the first processing subsequent to the effective date of the Act, and this irrespective of the fact that one or more processings had occurred prior thereto.

Shortly after the Act became effective, there was promulgated under the Revenue Act of 1934, Treasury Regulations 48, which among other things provided: "First domestic processing means the first use in the United States on or after the effective date of the Act." This Regulation has been in effect at all times pertinent to the instant in-

quiry. Plaintiff argues that the Regulation does violence to the language of Congress in that it in effect amends the enactment by inserting the phrase "on or after the effective date of the Act," while the defendant insists that the Regulation is a proper interpretation of the statutory language.

That the question for decision is a difficult one is evidenced by the contrariety of views held by numerous courts which have given consideration thereto. It has been decided favorably to the government by two Courts of Appeals, the Second Circuit in *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 Fed. (2d) 438, and the Third Circuit in *Colgate-Palmolive-Peet Co.* v. *United States*, 130 Fed. (2d) 913. The difficulty which the court had in the latter case is disclosed by the fact that a second opinion was filed upon petition for rehearing, to which there was a vigorous dissent. The question has also been decided, favorably to the government but by a divided court, by the Court of Claims in *Tasty Baking Co.* v. *United States*, 38 Fed. Supp. 844, which followed the reasoning of the Loose-Wiles case. In *Cincinnati Soap Co.* v. *United States*, 22 Fed. Supp. 141, and in *Armour & Co. of Delaware* v. *Harrison* (N. D. Ill.), decided July 14, 1937 (19 A. F. T. R. 1347), decisions were reached favorable to the taxpayer (the latter decision by Judge Barnes). In addition, Judge Sullivan, who tried the instant case below, decided for the taxpayer and rendered a well reasoned opinion which evidences a careful study of the question (46 Fed. Supp. 642). It is interesting to note that Judge Sullivan refused to follow the reasoning of the Third Circuit in the Colgate case and that Judge Maris, who dissented in the latter case, quoted with approval the opinion of Judge Sullivan in the instant case.

It would unduly prolong this discussion and perhaps serve no useful purpose to undertake to analyze and dis-

tinguish the reasoning by which these various courts have arrived at opposite results. It seems pertinent, however, to make a few observations. The court in the Loose-Wiles case apparently gave no consideration to the legislative purpose or history of the Act, and predicated its decision on the reasonableness of the Treasury Regulation which interpreted the Act as the first domestic processing "on or after the effective date of the Act." It concluded that Congress by an amendment to the Revenue Act of 1936 approved this administrative interpretation. On the other hand, the court in the Colgate case denied the contention that Congress by the 1936 amendment had given such approval. The court in the latter case, in reaching a decision favorable to the government, relied upon what it designated as two "sign posts," (1) that the statute is presumed to operate on future Acts unless the contrary intent is declared, citing *Hassett* v. *Welch*, 303 U. S. 303, and (2) the Treasury Regulations interpreting the Act. It is pertinent to note that the government in the instant case strongly urges these two so-called "sign posts" as guides to the construction which it seeks.

It seems plain, however, that the rule of "prospective operation" affords no support to the government's contention. In the cases relied upon, as well as others, which we have examined, the rule has been invoked in determining whether a statute was to be applied retroactively as distinguished from prospectively. That was true in *Hassett* v. *Welch, supra*, where the court construed an amendment to the Revenue Act relative to the estate tax imposed upon trusts. The government contended that the amendment was applicable to such trusts created prior to the enactment thereof. The court on page 307 said: "We hold that the statutes are prospective in their operation and do not im-

pose a tax in respect of past irrevocable transfers with reservation of a life interest." In the instant case, there is no question but that the statute is to be prospectively applied. The question is whether a second or third or some subsequent processing can be designated as the "first domestic processing" and therefore the taxable event.

We think there is no room for legitimate argument but that a literal reading of the language employed by Congress supports plaintiff's position. It is difficult to conceive of plainer language than the "first domestic processing." According to the government, however, first means second or third or fourth. If Congress intended first after the effective date of the Act, it could easily have so stated. Not only did it fail to do this, but it later in the same section defined the term "first domestic processing" as meaning "the first use in the United States." Certainly the "first use" took place simultaneously with the "first processing," which in the instant case was prior to the effective date of the Act.

This clear and unambiguous language calls for the application of another rule, long recognized by the courts but too often, we fear, honored only by lip service. In *United States* v. *Standard Brewery*, 251 U. S. 210, 217, the court said:

> "Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."

Again, in *United States* v. *Merriam*, 263 U. S. 179, 187, the court said:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such

> statutes are not to be extended by implication beyond the clear import of the language used."

Again, in *United States* v. *M. P. R. R. Co.*, 278 U. S. 269, 277, the court said:

> "We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. * * * Construction may not be substituted for legislation."

Another rule often overlooked in construing a revenue statute is that in a doubtful situation the taxpayer is entitled to the benefit of the doubt. As was said by the court in *United States* v. *Merriam, supra*, at page 188: "If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

Still another rule, wholesome in its nature, even though it bears the earmark of antiquity, is that laws are made by the legislative branch of the government and that both courts and administrative agencies are without authority to enlarge their scope. As was said in *United States* v. *Standard Brewery, supra*, at page 219: "While entitled to respect, as such decisions (of the Internal Revenue Department) are, they cannot enlarge the meaning of a statute enacted by Congress." Apropos to the government's reliance in the instant case upon the Treasury Regulation which enlarged the legislative words by inserting "after the effective date of the Act," is the case of *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498. There, the Commissioner by regulation sought to extend the scope of a revenue provision placing a tax upon oleomargarine. The statutory definition included "vegetable-oil annotto." The Commissioner issued regulations in which the quoted phrase ap-

peared as "vegetable oil, annotto," thereby extending the statutory definition of oleomargarine to include the product of the plaintiff in that suit. The court held the regulation invalid, stating on page 508:

> "Regulations promulgated under the Act omit the hyphen and add a comma thus making the phrase to read 'vegetable oil, annotto.' The Commissioner's determination that respondent's product is oleomargarine necessarily was based on that version. It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the Government and in favor of taxpayers."

It seems that the regulation relied upon in the instant case enlarges the statutory language to an extent even greater than the regulation condemned in the Miller case. Congress having imposed the tax upon the "first domestic processing," the administrative agency proceeded by regulation to broaden the legislative enactment so as to provide for its imposition, not only upon the "first processing" but any subsequent processing which occurred first after the effective date of the Act.

It seems that much of the confusion incident to the numerous attempts to construe Sec. 602½ is due to a failure to appraise its legislative history properly. True, a mere reading of the section immediately raises a doubt as to why Congress should impose a tax only upon the "first domestic processing" when there was a large amount of oil on hand which had theretofore been subjected to one or more processings. This doubt arises, notwithstanding the plain language which Congress employed. A study of the legislative history, however, dispels the doubt and discloses the purpose which Congress

sought to achieve. At this point, we note a statement in defendant's brief: "Section 602½ is a revenue measure and was intended to produce substantial amounts of money for the support of the Federal Government." Upon this premise, erroneous so we think, much of its argument is predicated. The legislative history demonstrates beyond controversy that the section was designed solely for the purpose of protecting the American farmer against imports of oils designated in the Act. Revenue was merely an incident to this main objective. The Act itself as to coconut oil expressly provides, "All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands * * *." Certainly that portion of the tax was not "for the support of the Federal Government."

This legislative history has been discussed to some extent in the *Colgate case*, 130 Fed. (2d) 913. Furthermore, it has been aptly described in the opinion of the District Court in the instant case, and we adopt that portion of the opinion. It follows:

> "All of the oils taxed under the Statute are imported oils. For many years prior to the imposition of the tax under Section 602½ there had been persistent agitation by the producers of domestic oils and fats for a tariff on foreign oils, as a protection against competition. The legislative history of Section 602½ clearly convinces me that it was the purpose of Congress to protect domestic farm products against competition from specified oils which were brought from outside the United States, by levying a tax on their first use within the United States. The Philippine Independence Act had been passed on

March 24th, 1934, (48 U. S. C. A. 1236 (b)) specifically authorizing the importation, free of duty, of a designated amount of coconut oil each year for a period of ten years, thus precluding Congress from placing an import duty thereon. Therefore, the amendments to subdivisions (a) of Section 602½, as adopted, provide for (1) a surtax of two cents per pound on coconut oil of non-Philippine origin; and (2) provided for the segregation and payment into the Philippine treasury of the entire tax collected on Philippine coconut oil. Tracing the progress of the oil processing tax statute from its inception as Section 602 of the Revenue Act of 1934, to its final enactment as Section 602½ thereof, the Congressional debates and reports all evidence the same legislative purpose of protecting the American farmers' products against oils brought in from outside the United States. The debates show that it was the intention of Congress, in enacting Section 602½, to extend to foreign oils the same type of processing tax as had already been levied upon the American farmers' products by the Agricultural Adjustment Act, and to use such tax as a substitute for a protective tariff. Congress also used the same taxing phraseology to levy the processing tax as it had used in the Agricultural Adjustment Act, and the Commissioner there interpreted the language to mean 'first in fact'. I therefore do not believe that it is a reasonable interpretation of Section 602½ to construe the language there used as meaning 'first after the effective date of the Act'. Congressional Record, Vol. 78, pages 2513-2529; 2614-2658; 6308-6324-6314-6316-6380.

"Considering the fact of the derivative language of Section 602½ from the Agricultural Adjustment Act, and the administrative interpretation of the taxing phrase 'first domestic processing' used in the Act then in effect, as meaning 'first in fact', and the apparent adoption by Congress of that interpretation

by defining the taxing phrase in Section 602½ to mean 'the first use in the United States', without adding the further phrase 'after the effective date of the Act' which phrase was supplied by the Commissioner in the Regulation, I believe it is clear that Congress intended to and did levy the tax under Section 602½ upon the first use of the imported oils after they reached the United States, with no thought of taxing any subsequent or later use thereof. In fact any subsequent processing or use would not have achieved the protective purpose which Congress was seeking."

The Third Circuit in the Colgate case recognized that the provisions of Sec. 602½ were derived largely from Sec. 9 (a) of the Agricultural Adjustment Act. The latter Act, previously passed by the same Congress, provided:

> "* * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity whether of domestic production or imported, and shall be paid by the processor. * * *"

It will be observed that the taxable event in each Act was precisely the same, that is, "the first domestic processing." There was promulgated by the Treasury Department, in connection with the Agricultural Adjustment Act, Article 7 of Regulation 81 which, as amended September 20, 1933, provided:

> "When the first domestic processing begins before the effective date, no tax attaches, although it is not completed until after the effective date."

Thus, at the time of the enactment of Sec. 602½, Congress not only employed exactly the same phraseology as it had previously employed in the other Act, but had before it the

administrative regulation which relieved the processor from tax where the processing had been completed or commenced prior to the effective date of the law. The court in the Colgate case stated, "If the provisions of Sections 9 (a) and 602½ are deemed to be in *pari materia*, the two sections should be interpreted similarly." With that statement we agree and are of the view that the two provisions were in precisely that situation. That court, however, reasoned that the two sections could not be so considered for the reason that Congress in the Agricultural Adjustment Act provided what was designated as a floor tax upon commodities theretofore processed, and that because no similar provision was contained in the Revenue Act of 1934 the two provisions cannot be deemed to be in *pari materia*. We disagree with this reasoning. It ignores the purpose sought by the Act under consideration, as shown by its legislative history.

As already shown, Congress was attempting to protect the farmer from competition with imported oils largely from the Philippines. By reason of the Philippine Independence Act, it was precluded from placing an import duty on such oils. It sought to accomplish the same objective by imposing a tax upon the "first processing," defined as the "first use in the United States." The imposition of the floor tax upon oil already processed would have been no aid in the accomplishment of the desired purpose. The revenue feature of both the Act under consideration and the Agricultural Adjustment Act was purely incidental and not for the benefit of the Federal Government. In the former, the taxes on coconut oil were to be segregated in the Treasury and paid to the Philippine Islands. In the Agricultural Adjustment Act, the taxes were to be segregated and paid to the American farmer as

benefits. Furthermore, the effect of the construction sought by the government as applied to the instant situation would come close to imposing a floor tax by regulation. The fact that Congress, after imposing a floor tax in the Agricultural Act, made no such provision in the instant Act, is also a significant circumstance that Congress did not intend that a tax should be imposed upon the designated oils processed prior to the enactment.

The government, in support of Treasury Regulation 48, urges that Congress gave its approval thereto by numerous subsequent amendments, and particularly that of 1936. It is not seriously contended, however, that the subsequent amendments other than that of 1936 have any bearing upon the situation. As heretofore stated, the court in the Loose-Wiles case accepted the government's view in this respect, while the court in the Colgate case rejected it. Our study of this amendment leads us to the conclusion that it affords little, if any, aid to the construction sought by the government. True, the taxable event was described as the "first domestic processing," as it had been in the Act of 1934. This may be some indication that Congress approved the Regulation definition of the word "first," as meaning the first processing after the effective date of the Act. However, there is language in the amendment which we regard as inconsistent with an intention on the part of Congress to subscribe to the Regulation interpretation.

The amendment, among other things, provides two exemption clauses, (1) respecting certain fatty acids and salts, and (2) certain mixtures and combinations. Clause (1) was conditioned on "a previous first domestic processing taxed under this section," while clause (2) was conditioned on "a previous first domestic processing." The difference in the phraseology of clauses (1) and (2) ap-

pears to indicate a recognition of two classes of first domestic processing, (1) taxed, and (2) not taxed. This is inconsistent with the government's theory, which calls for the imposition of the tax on every first domestic processing. This is so for the reason that every processing subsequent to the date of the Act is designated as a "first" processing. On the other hand, according to plaintiff's theory, the tax is imposed only where the first processing takes place as a matter of fact subsequent to the date of the Act. Where the first processing, however, has taken place prior to the Act, no tax is imposed. Thus, according to plaintiff's theory, there are two classes of first domestic processing, one taxed and the other not taxed.

Another circumstance, so we think, which militates against the theory of Congressional approval of the Regulation is that the Act was two years old at the time of the passage of the amendment of 1936. By that time, the oil on hand in May 1934 had no doubt been used, and the construction placed upon the word "first" had lost its significance.

We, therefore, are of the view that the court below correctly decided the issue involved in this appeal.

Appeal No. 8172 involves a claim for refund of a part of the taxes paid by plaintiff with respect to the processing of some 172,000,000 pounds of coconut oil, palm kernel oil, and sesame oil during the period July 1934 to January 1936, inclusive. The issues arising on this appeal appear to require a further statement as to the facts. As already stated, plaintiff in the production of refined oils engages in a number of processings, of which the first is known as the neutralizing process. All of the oils involved in this suit were subjected, in addition to the neutralizing process, to the processes of washing and bleaching, and some were subjected to further processes. Taxes were paid upon the total

weight of the oil which entered the first domestic processing, that is, as applied to these oils, the neutralizing process. A part of the total quantity of these oils thus processed was sold by plaintiff at the end of the bleaching process, to manufacturers of pharmaceuticals, cosmetics and soaps. The remainder of such oils was subjected by the taxpayer to a fourth operation, known as the deodorizing process. A portion of the oils subjected to the latter process was sold to manufacturers of food products, and the remainder was further processed by plaintiff in the preparation of margarine, shortening, and a hard butter for the confectionery trade.

As extracted from copra, palm kernels and sesame seed respectively, these oils customarily contain a small percentage of fiber, hair, sand, moisture, etc., known collectively as the M. I. U. content.[1] They also contain free fatty acids in quantities ranging from five to six percent in the case of coconut oil and palm kernel oil, to about one percent in the case of sesame oil. In the neutralizing process, most of the free fatty acids, together with about 55% of the so-called M. I. U. content, is separated and removed. The remaining 45% of the M. I. U. content, consisting of unsaponifiable substances such as alcohol, resinous matter, gums, etc., remains in the oil throughout the succeeding processes and is sold to the ultimate consumer. Traces of free fatty acids also remain in the oil during the subsequent processes.

During the neutralizing process, as well as during the washing, bleaching and deodorizing processes, there occur losses of oil. Such oil in small quantities settles out with the free fatty acids, sticks to the sides of the vat, drains

[1] M. stands for moisture. I. insoluble impurities, and U. the unsaponifiables, which include alcohols, higher alcohols, gum, and resinous matter.

out through leaky valves, is carried away with the water during the washing process, is absorbed by the bleaching ingredient during the bleaching process, or is carried away with the steam during the deodorizing process. The amount of the oil lost during these processes varies with the efficiency of the operations.

As already stated, the complaint in this case consisted of three counts. Under count (1), it was alleged that the taxes were improperly measured to include the M. I. U. content which was removed during the neutralizing process. Under count (2), it was alleged that the taxes were improperly measured to include oil, fatty acids, glycerol and coloring matter, which were lost during the processing operations. Under count (3), it was alleged that, as applied to the oils which were further processed by the taxpayer in the preparation of food products, the taxable "first domestic processing" was not the neutralizing process but was the first processing following the deodorizing process.

As heretofore noted, the court found for the taxpayer under count (1), and for the Collector under counts (2) and (3). According to plaintiff's bill of particulars, .21% of the weight of the oils entering the neutralizing process consisted of M. I. U., which was removed by that operation. Following the decision that plaintiff was entitled to a refund under count (1), this percentage was accepted by the defendant for the purpose of computing the judgment under this count. Such computation amounted to $10,721.41, for which judgment was allowed. The court also dismissed counts (2) and (3). Plaintiff appeals from such judgment of dismissal, and defendant appeals from the judgment against it entered under count (1).

At this point, we observe that subsequent to the court's decision, or at any rate subsequent to the court's announce-

ment as to what its decision would be, plaintiff sought to amend the bill of particulars which it had furnished prior to the commencement of the trial, and its complaint, if necessary, so as to include in counts (1) and (2) the free fatty acids. The court's denial of leave to amend is claimed to have been erroneous. The court also decided against the government's contention that plaintiff's claim for refund was insufficient to provide a sufficient basis in law for recovery. In view of the conclusion which we have reached, as subsequently stated, we think it is unnecessary to set forth the facts relevant to the decision of the District Judge, either as to its refusal to allow plaintiff to amend or that the claim for refund was insufficient.

In this appeal, as in No. 8171, a decision of the questions presented involves a construction of Sec. 602½ of the Revenue Act of 1934. In contrast to the question involved in that appeal, all of the acts of processing in the instant appeal took place after the date of the statutory enactment. Also, the questions presented in the instant case have not, so far as we are advised, been decided by any court other than the one below.

The questions raised on this appeal, insofar as they relate to the merits of the taxpayer's various contentions, must be dependent upon what Congress fixed as the taxable event. By the plain provision of the Act, the tax is imposed upon the "first domestic processing of coconut oil, sesame oil, palm oil, palm kernel oil or sunflower oil, or any combination, or mixture containing a substantial quantity of any one or more of such oils." It is important to keep in mind that the tax is not laid upon oil, but upon the "first domestic processing" thereof. As already shown, numerous processes are employed in the manufacture of the finished product, that is, refined oil. Among these numerous

processes, there is no question but that the "first domestic processing" is the neutralizing process, and it would appear that there could be no reasonable question but that this is the taxable event. However, the statutory definition that "the term first domestic processing means the first use in the United States, in the manufacture or production of an article intended for sale" furnishes the premises upon which plaintiff's contention under count (3), and under count (2) to a lesser extent, is predicated.

The argument is advanced that plaintiff is entitled to a refund based upon oil lost during the various acts of processing, upon the ground that such oil could not have been used. Further, it is argued that oils which were designed for the manufacture of oleomargarine and kindred products by the taxpayer were not intended for sale until they were processed into such manufactured articles. Such argument, in our opinion, is without merit. A construction consistent therewith would impute to Congress the purpose of providing a taxable event dependent upon the intention of the processor. For instance, if the processor intended to sell the refined oil, the taxable event would be the "first processing," but if he intended to use it for further manufacture, the taxable event would be the last rather than the "first processing" which Congress prescribed. The record discloses that there was some domestic processing for domestic use of the oils designated in the statute. It seems reasonable to conclude that Congress by the qualifying language employed intended that there should be no tax upon the processing of oil for such use. Moreover, "the first use" as used in the statutory definition evidently relates to the article produced as a result of the "first processing." Certainly, when Congress fixed the taxable event as the "first domestic processing," it did not intend to destroy the event

by the qualifying language employed in defining the event. Such would be the result, however, if the taxpayer's contention be accepted. Otherwise, the tax base would be in a state of flux, depending upon how much oil was lost, and whether the processor intended the processed article for sale or for further use in manufacture.

It is fair to note that plaintiff concedes that its position with reference to its claim under count (3) is inconsistent with its contention in appeal No. 8171. In that case, we have sustained its contention that it was not liable for the tax because the "first domestic processing" took place prior to the effective date of the Act. The same reasoning here requires us to hold that the tax is imposed upon the "first domestic processing" and that such processing is the "first use." It follows that the liability of the taxpayer became definite and fixed at that time and was not subject to change, by reason of subsequent developments. It also follows that it is not entitled to any refund on account of lost oil or the removal of fatty acids or any other extraneous ingredients as a result of subsequent processing.

Defendant's attack upon the court's action in sustaining plaintiff's contention under count (1) presents, in our judgment, the most difficult question involved in these appeals. It is the contention of the government that the tax is measured upon the total quantity of oil which enters the first domestic processing, including all the elements which the designated oils contain in their natural or crude state. Taxes were paid by the plaintiff upon this basis. Its claim for refund is for that portion of the taxes predicated upon the M. I. U. and fatty ingredients which were removed during this processing. The question, so we think, must be determined largely by the meaning of the word "oil" as used in the Act, always keeping in mind that the tax is upon

the first domestic processing and not the oil itself. While the tax is laid upon the processing, its measure must necessarily be determined by the oil processed. Does that mean the oil in its natural or crude state upon which the act of processing is performed, or does it mean the oil which results from this first processing? In this respect, the lower court stated:

> "If Congress had intended that the tax should be assessed upon the oil plus the extraneous matter, I believe it would have used the term 'crude oil' rather than coconut oil, palm oil, etc., as it did; just as I believe that if the Commissioner had intended to include the extraneous material in the measure of the tax, he would also have used the term 'crude oil' rather than 'oil' as it appears in Regulation 48 which defines the measure of the tax. Moreover, 'processing' is defined in the Statute itself as meaning 'the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed.' It is nowhere suggested that M. I. U. is ever the subject of use of any kind, nor is it possible to subject it to any use, as that term is defined in either the Statute or the Regulation."

We are unable to agree with the court's reasoning in this respect. As heretofore stated, it is our view that "the first use in the United States" takes place and is coextensive with the "first domestic processing." That is the first use of the designated oils, and it is that use or processing which constitutes the taxable event, providing of course the processing results in the production of "an article intended for sale." Undoubtedly, the article intended for sale is the oil which results from the processing. The tax, however, is laid upon the act of processing and not upon the article

produced thereby. The tax not being laid upon that which results from the act of processing, it appears that it should not be measured thereby. Consistent with this thought, we think it must be measured by the oil as it exists at the time it enters the act of processing.

We doubt if the meaning of the Act would have been any less free from ambiguity if Congress had employed the term "crude oil," as suggested by the lower court. If it had intended that the tax be measured by the amount of the finished product—refined oil—it certainly would not have imposed the tax upon the "first domestic processing," for the reason that refined oil does not result from this first processing but results only after numerous subsequent processings. If it had been intended that the tax be measured by the finished article, it appears reasonable to think that the taxable event would have been the last processing rather than the first. It would seem to follow that by making the "first domestic processing" the taxable event, it was intended that the tax be measured by the amount of crude oil. It is certain that it was not intended that it be measured by the amount of refined oil.[1]

Sec. 602½ was amended in 1936. (We have discussed this amendment in appeal No. 8171.) By this amendment, the tax was imposed not only upon the oils mentioned in the

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[1] The facts in this case fortify our view that the oils designated in the Act were those in their natural or crude state. According to the claim for refund, 36,491,875 pounds of material were subject to the first domestic processing, of which 35,762,038 pounds were actually oil, which means that there were 729,837 pounds of ingredients other than actual oil. In other words, only about 2% of the total poundage which entered the first processing was something other than oil. Congress no doubt had knowledge of the very small percentage of waste material contained in the oils designated and, therefore, found no reason to exclude such waste material from the basis for calculating the tax.

original Act but upon "fatty acids derived from any of the foregoing oils." It is argued that this was a recognition by Congress that the tax had not been imposed upon such fatty acids in the Act of 1934 and should be excluded in measuring the tax under that Act. This amendment, however, also provided that the tax should not apply to any fatty acids resulting from a previous first domestic processing "taxed under this Section." This also appears to be a clear recognition that some fatty acids had been and some had not been taxed by reason of a previous first domestic processing. As pointed out in our discussion in appeal No. 8171, we are of the view that Congress intended to distinguish between a "first domestic processing" which occurred prior to the effective date of the Act and one which occurred subsequently. In the former event, no tax had been imposed, while in the latter it had. We do not think there is anything in the 1936 amendment which aids the construction sought by plaintiff.

The court below also stressed a ruling of the Treasury Department announced in 1935 (S. T. 808, XIV-1, Cum. Bull. 396) which provided that "the elimination of dirt from crude oil by filtering or clarifying with bone char or fuller's earth, or similar agents, was not a taxable processing of the oil under the statute." It is thus reasoned that this ruling was a recognition by the Treasury Department that the dirt eliminated from crude oil was not to be included in the measure of the tax and that it would follow that the M.I.U. content and the fatty acids removed during the "first domestic processing" should also be eliminated. It must be kept in mind, however, that the Treasury Department did not recognize "filtering or clarifying with bone char or fuller's earth" as a processing. They were merely methods sometimes employed for removing certain extraneous mat-

ters. All parties to this appeal recognize and agree that the "first domestic processing" within the contemplation of the statute was the neutralizing process. Under these circumstances, as we view the situation, the position taken by the Treasury Department with reference to the elimination of dirt by a method which all parties concede was not the taxable event is not of persuasive force.

It is, therefore, our conclusion that plaintiff was not entitled to recover any part of the amount claimed in this appeal. Its tax was paid upon the total poundage which entered and was a part of the "first domestic processing," which was the proper measure of the tax.

The judgment of the District Court in appeal No. 8171 is affirmed. The judgment in appeal No. 8172 is affirmed, except that part in favor of the plaintiff predicated upon count (1) of the complaint, and, as to that, it is reversed.

KERNER, C. J. I dissent in appeal No. 8171.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

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JAN 6 1944

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1943

Nos. 38 and 39

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

October Term, 1943

Nos. 38 and 39

COLGATE-PALMOLIVE-PEET COMPANY, *Petitioner,* *vs.* UNITED STATES OF AMERICA.	**PETITION FOR REHEARING**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Colgate-Palmolive-Peet Company, respectfully prays for a rehearing of the above cases on these grounds.

1. That the facts with reference to the volume of domestically processed foreign oils named in Section 602½ of the Revenue Act of 1934 and of all other fats and oils on hand in the United States when that section was passed, and the facts with respect to total domestic production and consumption of fats and oils, show that there was then no occasion to protect domestic producers against such domestically processed foreign oils and no probability that Congress would have had any desire to extend the processing tax to them.

2. That the legislative history of Section 602½ shows that Congress was not concerned to avoid such tempo-

rary inequalities as might result from construction of its language according to its unqualified tenor.

3. That for those reasons and in view of the legislative history it is improbable rather than probable that Congress was concerned to tax such oils as are involved in this suit.

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Certificate of Counsel.

I, Mason Trowbridge, Of Counsel for Petitioner above named, hereby certify that the foregoing petition for Rehearing is presented in good faith and not for delay.

Mason Trowbridge.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING.

If petitioner reads correctly the opinion herein, the conclusion reached by the Court rests ultimately on the protective purpose of Section 602½ and the consideration that "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse."

The Court views as a "reasonable probability that Congress would wish to tax future processings." That "probability," if it be, must derive, of course, from the protective purpose of the tax and an intention that the tax should fall equally on all owners of these foreign oils.

The purpose was that stated by the Court:

> "But the legislative history cannot be read without reaching a conviction that the advantages which would result to American vegetable oil producers from the heavy tax on oils not produced in the continental United States played a leading part in promoting the legislation." (Opinion, p. 2.)

Whether or not it is "probable" that Congress wished to tax the first domestic processing after May 10, 1934 of oils already domestically processed before that date depends, aside from the matter of equal treatment, on whether such taxation could have been expected to result in any "advantages • • • to American vegetable oil producers" and producers of other American fats and oils; the tax was enacted to benefit all of them.

The following facts, existing at the time the statute was passed, show clearly that taxation of such oils could result in no advantages whatever to American fats and oils producers and that extension of the tax to such domestically processed foreign oils could accomplish nothing.

Figures filed with the Court by the Government, at the request of the Court made upon the argument, showed that

the amount of tax collected upon these domestically processed oils on hand on May 10, 1934 during the fiscal years 1935 and 1936 (*i. e.*, the first two years of collections after May 10, 1934), was estimated by the Treasury Department to have been approximately 12% of $52,148,172.04 which is $6,257,780.65. Assuming that this sum was collected entirely from oil subject to the 3¢ tax only (in fact some of the oil also paid the 2¢ surtax), that means that the amount of preprocessed oil on hand on May 10, 1934 was about 208,592,688 pounds.[1] Compilation of the figures in the reports of the Bureau of the Census on "Animal and Vegetable Fats and Oils—Production, Consumption, Imports, Exports and Stocks—Quarterly for Calendar Years 1931 to 1935" shows that there were on hand in this country on the dates shown the following amounts of fats and oils available for use, including the oil content of oil seeds, copra, etc., on hand at mills:

Date	*Number of Pounds*
March 31, 1932	2,473,995,000
March 31, 1933	2,532,661,000
March 31, 1934	2,754,629,000

So the stocks of those domestically processed foreign oils constituted approximately 7½% of the total stocks of fats and oils in this country when Section 602½ was passed by Congress in May, 1934.

These same census reports show (figures compiled) that the annual consumption of fats and oils in this country exceeds the annual domestic production.

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[1] The amount of such preprocessed oil on which a tax was paid after June 30, 1936 must have been negligible. It was 6% of the total paid by the petitioner, as appears from the Stipulations of Facts in the record.

Year	*Domestic Production*	*Domestic Consumption*
1932	6,239,665,000	6,664,505,000
1933	6,370,375,000	6,858,067,000
1934	6,090,373,000	7,325,580,000

This table not only shows an excess of domestic consumption over domestic production but also shows that the 208,000,000 pounds of preprocessed oils on hand on May 10, 1934 constituted in 1934 something less than 10 days' usage of fats and oils for the country.

This then was the situation in May 1934. These domestically processed foreign oils constituted only 7½% of the total supply of fats and oils then in the country. They amounted to only ten days' domestic usage of all fats and oils. There was not enough volume to retard the advance in prices of domestic fats and oils which Section 602½ was intended to bring about, even if it be assumed, contrary to the fact, that it was all held for sale.[1] At what price would the owners of these oils have offered them for sale? At the best price they could get. With domestic consumption exceeding domestic production they would not have had to underbid the domestic product in order to sell their holdings. They would have shared along with domestic producers in the expected advance in the general price level of untaxed oils. That is what would have happened if these domestically processed foreign oils had been held for sale. For the

[1] As a matter of fact only a part, and probably an inconsequential part, of the 208,000,000 pounds was held for sale. The petitioner itself owned and used in manufacture more than 39% of the 208,000,000 pounds (Stipulations of Facts). That leaves an amount of preprocessed oils in the hands of others than petitioner on May 10, 1934 which was only 4½% of the total stocks of fats and oils on hand in the country on that date, and amounted to one week's usage of fats and oils. And of course not all that was held for sale. The probability is that very little of it was so held. If petitioner was holding its stocks of preprocessed oils for its own further use in manufacture it is not to be doubted that other manufacturers were doing the same.

most part they were not held for sale and were no longer competing with the domestic products.

Petitioner is here making no speculative argument. Petitioner is testing the "probability that Congress would wish to tax future processings" of oils already domestically processed on May 10, 1934. We have pointed out that neither the wording of Section 602½ nor its derivation, nor the Congressional debates nor the Committee Reports, show that the word "first" was intended to be taken in the qualified sense of first after the effective date of the tax and we are met with the answer, *inter alia*, that Congress "*probably*" would have wished to tax future processings. We know of no way of testing the probabilities except by the facts which existed when the tax was enacted. If it be said that, so far as is disclosed, Congress was without knowledge of the facts with respect to those oils and their possible effect, if untaxed, upon the domestic market, we see no warrant for assuming that Congress struck out blindly to protect the domestic market against them. One cannot very well attribute to Congress a purpose to protect the American producer against those oils but complete ignorance as to their actual capacity to injure the American producer, which was nil.

In the absence of any shred of factual evidence that Congress was in any way concerned to tax oils already domestically processed we submit that such a concern can only be inferred if, at the time the tax was enacted, failure to tax such oils would have appeared likely to defeat in some degree the advantage intended to be conferred upon American producers of oils and fats. The fact is, as the figures show, that no one cognizant of the situation at that time could have entertained any such expectation.

The construing of a statute is an effort to find out what the legislature actually intended. It deals with realities. What *actually* did Congress have in mind, is the question

posed. The history of Section 602½ and the debates and Committee Reports answer clearly. What Congress *actually had in mind* was the restriction of future imports by the imposition upon the foreign oils of the same tax theretofore imposed upon domestic agricultural products with which they competed, which was a tax upon the earliest domestic processing. That is what is talked about in the debates. That is what Congress did. There is no hint in the debates or Committee Reports that in repeating the language of its then recently enacted Agricultural Adjustment Act Congress intended that language to mean something different from what it meant in the A. A. A. Why reason that the words "the first domestic processing" in A. A. A. meant earliest domestic processing only because otherwise there would have been double taxation when that is their normal meaning when unqualified, and why reason that in the absence of that particular compulsion the words are not to be given their normal meaning? An amendment to the section was passed in 1936 containing differently worded exemption clauses which are explicable if the petitioner's interpretation of the section is correct; but inexplicable if the Treasury Department's interpretation is correct, except by viewing the difference as an inadvertence.

Those are the realities of this case.

Neither the legislative history of Section 602½ nor the facts spell out any "probability that Congress would wish to tax future processings" of these foreign oils already domestically processed on May 10, 1934. A different conclusion might be drawn from the figures, standing alone, with respect to the amount of tax collected on such oil. Those were the figures requested by the Court and were the only figures before it other than those relating to petitioner's own usage. But when those figures are compared with figures of total stocks on hand and total domestic production and consump-

tion it is plain that there was no reason to fear any adverse effect upon the American farmer from the relatively small volume of foreign oils which had been domestically processed before May 10, 1934.

The Court is "not convinced that the difference in language [of the two exemption clauses in the 1936 Amendment] was meant to evidence a difference in meaning" and is of the opinion that "The careful provision requiring payments of applicable import taxes under all conditions tends to the contrary conclusion." It would seem to petitioner that the care shown in the framing of the latter provision would tend to show that the other provisions of the exemption clauses were worded with equal care and that Congress did intend to create the actual distinction which the difference in language clearly indicates.

With reference to equality of taxation, on page 3 of the opinion the Court says:

> "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse. Yet the omission by Congress of a tax upon the first processing which followed the enactment of the Act would give users of the oils who had treated them prior to the Act a definite advantage over their competitors who had not done so."

But there still remains the question whether there is to be attributed to Congress a desire in this instance to avoid the particular temporary inequality which the Court points out and whether such a desire can be attributed to it with sufficient certainty to warrant, in the face of the legislative history and the unqualified language of Section 602½, the construction which the Treasury Department has put upon the section. Again petitioner points to that history:

When by amendment of the original bill imported whale oil, imported fish oil and imported marine-animal oil were

deleted from the section imposing a processing tax and made subject to a duty of 3¢ a pound instead of a 3¢ processing tax, Congress certainly evinced no concern over the similar inequality which that produced though it gave an advantage not merely to the owners of domestically processed fish, whale and marine-animal oils but likewise to the owners of crude fish, whale and marine-animal oils, on hand on May 10, 1934. What reason is there to suppose Congress was any more concerned over other preprocessed oils?

The House Ways and Means Committee was specifically urged to supplement the processing tax in Section 602½ with a floor stocks tax. There was a floor stocks tax in the A. A. A. from which statute the instant tax was borrowed. A floor stocks tax would not only have obviated the inequality which the Court points out but other inequalities consequent upon the imposition of the processing tax however it be construed. We refer to the advantage possessed by those manufacturers who on May 10, 1934 had in stock finished articles or articles in process of manufacture into the making of which these oils entered, but in the making of which they lost their identity as oils so that the oil processing tax could not be collected with respect to them however interpreted. But the Committee did not include a floor stocks tax in the bill. It was not concerned over any temporary inequalities.

One must attribute to the Ways and Means Committee either an intention to tax these preprocessed oils or an intention not to tax them. To attribute to the Committee an intention to tax them, means that the Commitee instead of providing clearly for their taxation by a floor stocks tax left the effectuation of its intention to the hazards of interpretation, relying upon the Treasury Department to apprehend that taxing language copied from the Agricultural Adjustment Act was to be given a different meaning in Section 602½.

Congress intended to tax the products subject to the A. A. A. whether previously processed or not and so declared; the processing tax was supplemented by a floor stocks tax. Congress did not declare any such purpose when it enacted Section 602½.

> "If Congress, however, had the purpose assigned by the commissioner, it should have declared it; when it had that purpose it did declare it." (*Shwab* v. *Doyle*, 258 U. S. 529, 536.)

The Government contends that "first" means "next." Petitioner submits that the actual and abundant evidence is to the contrary.

Respectfully submitted,

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P. 4.

SUPREME COURT OF THE UNITED STATES.

Nos. 38 and 39.—October Term, 1943.

38	Colgate-Palmolive-Peet Company, Petitioner, *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
39	Colgate-Palmolive-Peet Company, Petitioner, *vs.* The United States of America.	

[December 13, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

These two writs of certiorari were granted to review a judgment of the Circuit Court of Appeals for the Third Circuit denying recovery to the petitioner of taxes paid to the United States aggregating $2,532,643.16. The issues in the two cases are identical. Each case covers a separate period of time.

The suits were brought in the United States District of Delaware under Judicial Code § 24(20). Recovery was there also denied. We granted certiorari because of a conflict of decisions. 319 U. S. 778. See *Harrison, Collector* v. *Durkee Famous Foods, Inc.*, 136 F. 2d 303; *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. 2d 438; *Tasty Baking Co.* v. *United States*, 38 F. Supp. 844; *Cincinnati Soap Co.* v. *United States*, 22 F. Supp. 141.

The issue is narrow and may be simply stated. In the Revenue Act of 1934, § 602½, 48 Stat. 763, an excise tax was levied on the "first domestic processing" of certain foreign oils—coconut, sesame, palm, et cetera.[1] When the act was approved on May

[1] 48 Stat. 763, Sec. 602½ Processing Tax on Certain Oils.

"(a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernal oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. . . . For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

10, 1934, this petitioner had on hand large quantities of these oils which had gone through one or more domestic processings. After the effective date, all of this oil was subjected to further processing upon which petitioner paid a tax, recovery of which is here sought. The taxpayer urges that the taxable event fixed by the statute is the first domestic processing, without regard to when it occurs. The phrase is defined by the statute as "the first use in the United States . . . of the article" taxed. Since the effective date of the Act is May 10, 1934, the taxpayer concludes that if the first use in this country occurs after that date, it is a taxable event, and if it occurs before May 10, 1934, it is not a taxable event. The Government reads the Act differently. To it, the Act imposes a tax on the first domestic processing after the effective date of the Act, regardless of the prior domestic processing. The litigants agree that the section is not retroactive. The facts are not in dispute.

The section in question does not make clear whether the "first domestic processing" is the first which takes place in this country or the first after the passage of the Act. The definition in § 602½ does not aid the interpretation. "First use" may be first after importation or first after the Act. The likelihood that tax statutes look to the future and not the past indicates that processings after the effective date were meant to be taxed. Cf. *Hassett* v. *Welch*, 303 U. S. 303; *Shwab* v. *Doyle*, 258 U. S. 529. This likelihood does not depend upon any taxation of a past event but upon the reasonable probability that Congress would wish to tax future processings. The insertion of the qualifying adjective "first" was probably due to a desire to avoid accumulative taxes on successive processings. Treas. Reg. 48, Art. 1, as amended by T. D. 4695.

An examination of the general Congressional purposes intended to be served by the Act will further aid in the resolution of this dispute. This tax has been held by this Court to be a valid exercise of the taxing power. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 312. But the legislative history cannot be read without reaching a conviction that the advantages which would result to American vegetable oil producers from the heavy tax on oils not produced in the continental United States played a leading part in promoting the legislation.[2] *Id.*, 320. The tax yielded sub-

[2] 78 Cong. Rec. 2785, 2793, 2930, 3007, 6311-16, 6380-95, 7246, 7976.

stantial revenues, which were remitted to the Philippine Government, since the Philippines were the source of many of the products taxed.

A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse. Yet the omission by Congress of a tax upon the first processing which followed the enactment of the Act would give users of the oils who had treated them prior to the Act a definite advantage over their competitors who had not done so. The advantage would be slight if Congress had supposed the tax would finally be borne by the consumer rather than by the manufacturer, but here the purpose was to restrict the domestic market for imported oils, and Congress probably would not intend that manufacturers should find a market for the foreign oil at a price enhanced by the full amount of the tax. Again, if petitioner's argument is sound, the Congressional purpose to create an advantage for domestic oil producers would be frustrated to the extent that tax free foreign oils on hand could continue to compete with the domestic product. A major purpose of the legislation would be temporarily defeated in part by freeing from the tax oil which had received one domestic processing.

The Treasury promptly interpreted the Act to apply to all first processings after its effective date. Treas. Reg. 48, Art 1(1), August 17, 1934. This action of the Treasury, with its wide experience in tax matters, has weight in our conclusion, notwithstanding the prompt challenge of the taxpayer and others similarly situated. *United States* v. *American Trucking Ass'n's*, 310 U. S. 534, 549.

In reaching the conclusion that the "first domestic processing" is the first after the passage of the Act, we do not disregard some circumstances vigorously pressed upon us by petitioner which give color to the opposite interpretation. The taxpayer points to the fact that the phrase "first domestic processing" was used earlier in § 9(a) of the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31, 35, which levied a similar processing tax upon the first domestic processing of the basic agricultural commodities—wheat, cotton, corn, hogs, rice, tobacco and milk—and that, at the time this tax was placed on foreign oils, a regulation of the Commissioner of Internal Revenue was in effect which interpreted the phrase as being the first domestic processing whenever it oc-

curred and therefore as relieving a processor of the tax when the first domestic processing took place prior to the effective date of the A. A. A. Treas. Reg. 81, as amended, T. D. 4403, November 2, 1933.

The answer to this argument arises from the difference between the two acts as to the taxation of floor stocks. Under the A. A. A. commodities which had undergone their first domestic processing prior to the passage of the Act bore a corresponding floor stock tax. 48 Stat. 40, § 16. A subsequent processing tax would have created double taxation and an inequality among taxpayers which the compensating floor stock tax had obviated. The exemption of subsequent domestic processing by the Treasury Regulations was thus compelled by the Act itself. Cf. Treas. Reg. 82, Floor Stocks under the A. A. A. No such provision appears in the Revenue Act of 1934 or any later legislation supplementing § 602½. Phrases without definite legal connotation which are alike take their meaning from their context. The "first domestic processing" of the A. A. A. naturally refers to the first in point of time to avoid double taxation, while the same words in this Act just as naturally refer to the first after the Act to avoid inequalities. Double taxation does not arise from the later Act.

For a further point, petitioner calls attention to the action of Congress in amending § 602½ in the Revenue Act of 1936, 49 Stat. 1742, by adding fatty acids and salts derived from the taxed oils with the proviso that the tax should not apply:

"(1) with respect to any fatty acid or salt resulting from *a previous first domestic processing taxed under this section* or upon which an import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, or (2) with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been *a previous first domestic processing* or upon which an import tax has been paid under such section 601(c)(8)."

This amendment came from the Conference Committee without comment. H. Rep. No. 3068, 74th Cong., 2d Sess., p. 17. Its origin was in the Senate. The purpose of the exemption was said to be "to avoid double taxation." S. Rep. No. 2156, 74th Cong., 2d Sess., Title V. Petitioner's contention is . . . that the Conference Committee wrote into the amendment two different clauses, one of them . . . creating an exemption of mixtures and combinations conditioned upon a 'previous first domes-

tic processing' and the other creating an exemption of fatty acids and salts conditioned upon their 'resulting from a previous first domestic processing *taxed under this section.*'" Therefore Congress is said by petitioner to have recognized two classes of first domestic processings; one taxed under the section, the other not taxed. In the absence of some expression of such intention, however, beyond the words quoted, we are not convinced that the difference in language was meant to evidence a difference in meaning. Cf. *Haggan Co.* v. *Helvering*, 308 U. S. 389, 400. The careful provision requiring payments of applicable import taxes under all conditions tends to the contrary conclusion. We think the purpose of the 1936 amendment was to add new taxable articles and to make plain the purpose to free them from double taxation. If the articles are not exempt from the 3 cent excise because of foreign processing, we see no reason to exempt them because of domestic processing prior to the Act.

Finally we consider petitioner's argument that House Report (Conference) No. 1385, 73d. Cong., 2d Sess., p. 30, manifests the intention of Congress to tax only the "first domestic processing" which occurs after the Act when there has been no previous domestic processing prior to the Act. This report deals with the Revenue Act of 1934. The Senate amended the section of the House bill which taxed foreign oils by the addition of other foreign vegetable oils and marine oils. The Conference accepted the amendment in regard to the marine oils but changed "the point of imposition of the tax in the case of imported whale oil, imported fish oil and imported marine animal oil to the importation instead of the first domestic processing." These were all the marine oils in the Senate amendment.

By the Conference amendment these marine oils were placed in an entirely different section, 602, of the Revenue Act of 1934. It amended 601(c), Revenue Act of 1932, which imposed an excise tax on the domestic producer or the importer of lubricating oils, grain extracts, petroleum, coal, lumber, et cetera, by adding these marine oils to the taxable articles.[3] Regulations treated

[3] 48 Stat. 762, Sec. 602. Tax on Certain Oils.

"Section 601(c) of the Revenue Act of 1932 is amended by adding at the end thereof a new paragraph as follows:

"'(8) Whale oil (except sperm oil), fish oil (except cod oil, cod-liver oil, and halibut-liver oil), marine animal oil, and any combination or mixture containing a substantial quantity of any one or more of such oils, 3 cents per pound. The tax on the articles described in this paragraph shall apply only

marine oils upon the same basis as the other taxed imports in the section.[4] Consequently marine oils imported prior to the Revenue Act of 1934 escaped taxation when eventually processed. This inequality of treatment, under the Government theory, between importations of vegetable oils and importations of marine oils indicates, says the petitioner, that the Government is wrong and Congress intended to tax processing only when a prior domestic processing either before or after the Act had not occurred. The Conference change, says petitioner, "was merely a shift of the tax on these particular oils from the first processing after the entry (the point of imposition under Section 602½) to the entry itself." But though Congress may have been willing to defer protection of American producers from marine oils, it nowhere indicated that handlers of other oils already processed should obtain a trade advantage through exemption.

We are confronted with an ambiguity of phrase which yields to the intent of Congress as disclosed by the legislative history. In such circumstances, we follow the general purpose of the Act to promote the interests of domestic oil producers through an excise tax.

Affirmed.

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

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with respect to the importation of such articles after the date of the enactment of the Revenue Act of 1934, and shall not be subject to the provisions of subsection (b)(4) of this section (prohibiting drawback) or section 629 (relating to expiration of taxes).' "

[4] Treasury Department Bureau of Customs Circular Letter, No. 1202, May 11, 1934; T. D. 45751; T. D. 47448.